(20,501.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 181.

LIU HOP FONG, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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1 In the United States Circuit Court of Appeals for the Eighth Circuit.

Liu Hop Fong, Plaintiff in Error,
vs. No. 2373.
The United States, Defendant in Error.

Stipulation as to Printing the Record.

In view of the fact that (1) the United States Commissioner's transcript, and (2) his additional separate finding, and (3) plaintiff in error's motion or petition for a new trial, appear in the transcript or record herein twice, in the record proper and also in the bill of exceptions, it is hereby stipulated and agreed by the above named parties that these three papers shall be printed but once, not where they appear in the record proper, but only as and where they appear in the bill of exceptions, and that in place of each thereof in the transcript it shall be stated respectively: "The transcript will be found at page — of the printed record"; "The additional separate finding will be found at page —— of the printed record"; "The motion or petition for a new trial will be found at page — of the printed record," the proper paging to be inserted by the clerk. This stipulation shall be printed with the record.

FRANK L. McCOY,
ROBERT H. OLMSTED,
Attorneys for Plaintiff in Error.

A. W. LANE, Asst. U. S. Atty.,
Attorney for defendant in Error.

No. 2373. Liu Hop Fong, Plaintiff in Error, vs. United States of America. Stipulation as to printing record. Filed Jan. 30, 1906. John D. Jordan, Clerk.

2 Be it remembered that: On the 9th day of January, 1905, a Transcript of Proceedings before United States Commissioner was filed in this Court which said Transcript is in words and figures following to-wit:

* * * * *

("The transcript will be found at page 12 of the printed record.")

5 Thereupon also: On the 9th day of January, 1905, the original Complaint before said Commissioner was filed in said case, which said Complaint is in words and figures following to-wit:

United States of America,
District of Nebraska—ss.

Before me, Gustave Anderson, a Commissioner of the District Court of the United States for the District of Nebraska, personally appeared this day Irving F. Baxter, United States Attorney for the District of Nebraska, who being duly sworn on oath states that he is informed and believes that one Leo or Luie Hop, a Chinaman, on this 23rd day of November, 1904, is unlawfully within the United States of America, to-wit, is now within the District of Nebraska, and living and residing at 319 North 15th St., Omaha, Nebraska, and is now pursuing the occupation of a common laborer, contrary to the laws of the United States of America. Wherefore, said Irving F. Baxter, United States Attorney, prays that a warrant may be issued for said Leo or Luie Hop, and that he may be arrested and dealt with according to law.

The following named persons are material witnesses to the subject matter of this complaint.

IRVING F. BAXTER,
United States Attorney.

Subscribed in my presence and sworn to before me this 23 day of November, 1904.

GUSTAVE ANDERSON,
Commissioner of the District Court
for the District of Nebraska.

Endorsed, Filed Jan. 9, 1905, R. C. Hoyt, Clerk.

6 Thereupon afterwards, to-wit: On the 9th day of January, 1905, an additional and separate Judgment and Order for Deportation was filed in case 507 N., which said order is in words and figures following, to-wit:

* * * * *

("The additional separate finding will be found at page 14 of the printed record.")

9 Thereupon afterwards, to-wit: On the 13th day of April, 1905, a Memorandum Opinion was filed in case No. 507 N., which said opinion is in words and figures following to-wit.

In the District Court of the United States for the District of Nebraska.

The United States, Plaintiff,
No. 507 N. vs.
Liu Hop, Defendant.

Memorandum Opinion.

Munger, J.

This is an appeal from the finding and judgment of the United States Commissioner, finding that Liu Hop is a Chinaman in the United States in violation of the Act of Congress and ordering his deportation.

It appears that Liu Hop is a Chinaman; that he landed in the United States at the City of San Francisco, on or about July 2, 1899, or shortly thereafter, and during the year 1899 he came to the City of Omaha, where he has since resided, and engaged as a common laborer. His entry into the United States was by virtue of a certificate, proper in form, issued by the Colonial Secretary of Macau Province, by authority of the Governor of said Province, dated May 17, 1899, which authorized him to enter the United States to study the English language and European sciences, and to live in the company of his brother, Liu-eng-Fun, manager of the firm of Lun-Sing-Chong, Rock Springs, Wyoming, and San Francisco, California.

10 The only study that he has pursued in this country is the simple rudiments of the English language taught by his Sunday School teacher. This does not make him a student of the English language and European sciences within the meaning of the Act of Congress, and I am clearly of the opinion that the facts as found by the Commissioner indicate that his coming to the United States to study the English language and European sciences as a student was a mere device to gain entry into this country, and not in good faith to pursue the studies of a student; that his real intent and purpose in coming to the United States was for the purpose of laboring only.

I am of the opinion that his entry under the certificate mentioned was a fraud upon the United States, and such certificate does not afford him protection. It follows that the finding and judgment of the Commissioner were right and are affirmed, and Liu Hop is found to be a Chinaman unlawfully within the United States and ordered deported back to China.

Endorsed: Filed Apr. 13, 1905, R. C. Hoyt, Clerk.

11 Thereupon afterwards, to-wit: At the November Term, 1904, on the 13th day of April, 1905, the following proceedings were had in said case, as appear of record in Journal "U", page , of said Court, to-wit.

United States of America,
507 N vs.
Liu Hop.

This cause having been heretofore duly submitted to the Court upon an appeal by the defendant from the judgment of the United States Commissioner finding that said Liu Hop was a Chinese laborer, unlawfully in the United States, and ordering his deportation to China, and the Court after due consideration thereof and being fully advised in the premises,

Ordered, That the decision of the United States Commissioner be, and the same is, hereby affirmed, and the said Liu Hop ordered deported back to China.

To which ruling of the Court the defendant excepts.

Thereupon afterwards, to-wit: On the 22nd day of April, 1905, the following order was entered in said Court, adjourning the November Term, 1904, Sine Die in words and figures following, to-wit:

Ordered, That the November Term, 1904, do now ad-
12 journ Sine Die.

Thereupon afterwards, to-wit: On the 8th day of May 1905, a Petition for a new trial was filed in case No. 507 N., which said Petition is in words and figures following towit.

* * * * * * * *

("The motion or petition for a new trial will be found at page 16 of the printed record.")

18 Thereupon afterwards, to-wit: At the May Term, 1905, on the 28th day of August, 1905, the following proceedings were had in said case, as appear of record in Journal "U," page —— of said Court, to-wit:

United States of America,
507 N vs.
Liu Hop, true name Leo Hop Fong.

Motion for Rehearing Submitted.

This cause came on for hearing upon the application of defendant for a rehearing of said cause; said matter was duly argued and submitted to the Court, and by the Court taken under advisement.

Thereupon afterwards, to-wit: At the May Term, 1905, on the 27th day of October, 1905, the following proceedings were had in said case, as appear of record in Journal "U," page of said Court, to-wit:

United States of America,
507 N vs.
Liu Hop.

Rehearing Denied and Ordered Deported.

This cause coming on for hearing upon the application of the said Liu Hop for a rehearing, supported by affidavits, upon the order and judgment of this Court entered heretofore in this case on the 13th day of April, 1905, sustaining the decision of the United States Commissioner and ordering that the said Liu Hop be deported back to China, and after argument of counsel and being duly advised in the premises, overrules said motion for a rehearing and denies same. To which said
19 defendant excepts.

It is further Ordered that said Liu Hop be deported to China in accordance with the said judgment of this Court heretofore entered herein. To which defendant excepts.

United States of America,
507 N vs.
Liu Hop.

Order for Capias.

On motion of Irving F. Baxter, United States Attorney for the District of Nebraska, it is—

Ordered, by the Court, that a writ of capias issue out of this Court for the arrest of said defendant, Liu Hop, returnable forthwith.

20 Thereupon afterwards, to-wit: On the 3rd day of November, 1905, a Memorandum Opinion was filed in case No. 507 N., which said opinion is in words and figures following to-wit:

In the District Court of the United States for the District of Nebraska.

United States
507 N. vs.
Lin Hop.

Memorandum Opinion.

Munger, J.

This is an application for a rehearing. The original judgment was rendered at the November term, 1904. The application for rehearing was not made until after the term expired. The judgment became final with the termination of the term at which it was rendered.

I have, however, examined the evidence, and it is convincing that he was not a student within the meaning of the law. The law evidently meant and intended a student to be one who in coming to this country intended that to be his main object and

purpose; and although a student may perform manual labor while pursuing his studies for the purpose of maintaining and supporting himself, and not lose his status as a student, yet it should appear that his main purpose was that of being a student.

In this case, I think his main purpose and object was that of a laborer, and the studying which he did was a mere incident. The motion for a rehearing is denied, and the order of deportation stands.

Endorsed: Filed Nov. 3, 1905. R. C. Hoyt, Clerk.

22 Thereupon afterwards, to-wit: On the 7th day of November, 1905, a Petition for Writ of Error was filed in case 507 N., which said Petition is in words and figures following to-wit:

In the District Court of the United States, for the District of Nebraska.

United States of America, Plaintiff,
vs.
Liu Hop Fong, Defendant.

Petition for Writ of Error.

Now comes the defendant Liu Hop Fong and states that on the 13th day of April, 1905, and on Oct. 27, 1905, the Court entered judgment or sentence herein against him and in favor of the plaintiff, in which judgment or sentence and the proceedings had prior thereto in this case certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the defendant prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Eighth Circuit for correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

McCOY & OLMSTED,
Attorneys for Liu Hop Fong.

Endorsed: Filed Nov. 7, 1905. R. C. Hoyt, Clerk.

23 Thereupon afterwards, to-wit: On the 7th day of November, 1905, an Assignment of Errors was filed in case No. 507 N., which said assignment is in words and figures following to-wit:

In the District Court of the United States for the District of Nebraska.

The United States, Plaintiff,

vs.

Liu Hop Fong, Defendant.

Assignment of Errors.

Comes now the defendant, Liu Hop Fong, and makes the following assignment of errors for the purpose of a hearing of this case on appeal and error in the United States Circuit Court of Appeals:

1.

The court erred in hearing and deciding the case upon the findings of the commissioner alone, the evidence before the commissioner not being preserved and no evidence having been taken before the court or judge.

2.

The court or judge erred in hearing the case in the absence of the defendant and out of his presence.

3.

The complaint against the defendant in this case was and is insufficient in substance to constitute a valid complaint and is therefore void and insufficient to sustain the order of deportation made against the defendant, in that the charge that "the defendant is unlawfully within the United States of America" is limited, by the further and qualifying statement, to mean that the defendant is unlawfully here because he "is now pursuing the occupation of a common laborer" in view of which qualifying and limiting statement it was incumbent on
24 the complaint further to have alleged, which it failed to do, that while the defendant came here under a certificate entitling him to come as a student, nevertheless he came mala fide and with the sole and fraudulent intent of being a laborer when and while here and has been ever since coming into this country and is now such laborer, and the court erred in assuming or holding the complaint sufficient and in ordering the defendant's deportation thereon.

4.

The question whether the defendant came lawfully into this country was not put in issue by the complaint and was not tried, and could not be decided by the court, and it was error for the court to order the defendant deported without a hearing on that question.

5.

There being insufficient evidence to sustain a finding that the defendant came into this country, not with the main and bona fide purpose of being a student, but with the main and fraudulent purpose of being a laborer here, there was no sufficient evidence to sustain the order of deportation of the defendant.

6.

The court erred in ordering the defendant deported, because the defendant was a student and belonged to the student or teacher (and not laboring) class in China and was as such entitled to come and remain here.

7.

The court erred in ordering the defendant deported, because the Treaty and laws in force when the defendant came here in 1899 did not require a Chinese student, coming here for the purpose of learning, to intend to learn the European Sciences, and it was not competent for the administrative officer to make such additional requirement of him, by putting it into a certificate, so as to render him liable to deportation if he did not learn such European Sciences.

8.

The court erred in holding that the defendant came here not with the bona fide intent to extend his learning and to learn the English language, but with the main intent to be a laborer.

9.

The court erred in giving undue importance and weight to the length of defendant's residence here, in connection with the character of defendant's schooling or method of learning, in deciding against the bona fide of his coming as a student.

10.

The court erred in finding and holding that the character of defendant's schooling here was not a compliance with the law, because the law made no requirement or regulation as to the course or kind of teaching to be taken by him, or school to be attended, to acquire such learning.

11.

The court erred in finding and holding that the character of defendant's schooling here was not a compliance with the law, because the course of learning to be pursued and the time to be used for that purpose are left to his own discretion.

12.

The court erred in finding and holding that the character of defendant's schooling here was not a compliance with the law, because the extent of his mastery of any of the learnings is left to his own discretion and satisfaction.

13.

The court erred in finding and holding that the character of defendant's schooling here was not a compliance with
26 the law, because even if he had mastered the English language and European sciences, he would not be obliged to return to China or be liable to be deported.

14.

The court erred in finding and holding that the character of defendant's schooling here was not a compliance with the law, because having come here with such bona fide intent as a student, and having pursued his studies here bona fide for several years, he could afterward abandon his purpose to complete such course of study to the fullest extent and yet have the right to continue to reside here, and he was not obliged before leaving China to map out a complete plan of action for his whole life, part of which plan must have been to return to China when he completed his education and not be permitted for any reason to abandon or depart from that plan while here.

15.

The court erred in finding and holding that the defendant is a laborer, because defendant belonged by birth not to the laboring class and has been at no time while here a laborer.

16.

The court erred in denying defendant's application for a new trial, because the evidence is insufficient to sustain the finding that the defendant's main purpose in coming to this country was to be a laborer.

17.

The court erred in denying defendant a new trial on the ground that the court had no power to grant an application for a new trial filed after the adjournment of the term.

18

The court erred in denying the defendant a new trial,
27 because its action in so doing was an abuse of its legal discretion in the premises.

Wherefore, the defendant prays that the order of deportation be reversed and vacated and that he be discharged from custody or be granted a new trial herein.

McCOY & OLMSTED,
Attorneys for defendant, Liu Hop Fong.

Endorsed: Nov. 7, 1905. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit: On the 7th day of November, 1905, Writ of Error was allowed in said case, and a Citation duly signed and returned and filed, with acceptance of service endorsed thereon, on November 10, 1905, the following of which are the originals:

28 United States of America—ss.

The President of the United States of America, To the Honorable Judges of the District Court of the United States for the District of Nebraska—Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the November Term, 1904, thereof, and May 1905 Term thereof, between the United States, as plaintiff and Liu Hop Fong as defendant a manifest error has happened, to the great damage of the said Liu Hop Fong as by the record and proceedings and assignment of errors appears,

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforsaid, with all things concerning the same, to the United States Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 6th day of January 1906, to the end that the record and proceedings aforesaid be inspected. The United States Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of November, in the year of our Lord, One Thousand Nine Hundred and five.

Seal. United States District Court, District of Nebraska.

Issued at office in the City of Omaha, Nebraska, with the seal of the District Court of the United States for the District of Nebraska, dated as aforesaid.

R. C. HOYT,
Clerk District Court United States, District of Nebraska.

Allowed by
W. H. MUNGER,
Judge.

Return to Writ.

United States of America,
District of Nebraska.—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeas for the Eighth Circuit of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal. United States District Court District of Nebraska.

In Witness Whereof, I hereto subscribe my name and affix the seal of said District Court, at office in the City of Omaha, this 4th day of Jany. A. D. 1906.

R. C. HOYT,
Clerk of said Court.

No. 507 Doc. N. United States District Court. District of Nebraska.. United States vs. Liu Hop Fong. Writ of Error. To the District Court of the United States for the District of Nebraska. Filed Nov. 7, 1905. R. C. Hoyt, Clerk.

29 Citation—U. S. Circuit Court of Appeals (Error.)

The United States of America.

To the United States of America,—Greeting.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States for the District of Nebraska, wherein Liu Hop Fong is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Wm. H. Munger, Judge of the District Court of the United States for the District of Nebraska, this seventh day of November, in the year of our Lord one thousand nine hundred and five.

W. H. MUNGER,
United States District Judge, for the District of Nebraska.

Service of above citation accepted this 8th day of November. 1905.

IRVING F. BAXTER,
United States District Attorney for District of Nebraska.

No. 507 Doc. N. United States District Court, District of Nebraska. The United States of America, vs Liu Hop Fong, Citation. Filed Nov. 10, 1905, R. C. Hoyt, Clerk.

30 Thereupon afterwards, to-wit: On the 26th day of December, 1905, Bill of Exceptions was filed in said case, which said Bill of Exceptions is in words and figures following, to-wit:

In the District Court of the United States for the District of Nebraska.

The United States, Plaintiff,
N. 507 vs.
Leo Hop Fong, Defendant.

Bill of Exceptions.

Be it remembered, That on the 13th day of April, 1905, at the November 1904 term of the District Court of the United States for the District of Nebraska, Hon. William H. Munger presiding, the above entitled cause was called for trial, tried and submitted to the court or judge, but without taking any evidence and merely upon the complaint the transcript of his proceedings made by the United States Commissioner from whose order the case was appealed, and the additional separate findings made by said commissioner. , and the original student's certificate and translation thereof, with all endorsements and certificates thereon, under which defendant was admitted into and entered the United States.

District of Nebr.—ss.

United States of America,
No. vs.
Leo Hop, Defendant.

Before me, Gustave Anderson, a United States Commissioner for said District, complaint and affidavit was made (or presented) on this 23rd day of Nov. 1904, by Irving F. Baxter,

U. S. Attorney, charging in substance that on or about the 23rd day of Novbr. 1904, at Omaha in said District, the defendant, Leo Hop in violation of Section of the Revised Statutes of the United States, did unlawfully reside in the United States in violation of the Chinese exclusion law. Complaint approved by U. S. District Attorney on Nov 23, 1904.

On Nov 23, 1904, issued warrant to T. L. Mathews U. S. Marshal, returnable before Commissioner Anderson at Omaha on Nov. 23, 1904, warrant returned indorsed as follows:

'Received this warrant on the 23rd day of Nov. 1904, at Omaha and executed the same by arresting the within named Leo Hop at Omaha on the 23 day of Nov. 1904 and have his body now in Court, as within I am commanded.

T. L. MATHEWS U. S. Marshal.
Per H. A Homan Deputy 23rd day of Nov. 1904.'

On Dec. 29, 1904, issued subpoena for the following witnesses in behalf of the U. S.; Alfred Kennedy, Thos. Britton, Glen Campbell, Frank Hahne, Anna M. Sykes.

On Dec. 1904, said subpoena was returned, indorsed as follows:

'Received this writ Dec 29, 1904, and on or before Dec. 29, 1904, served the same on the within named Alf. Kennedy, Thos. Britton, Glen Campbell, Frank Hahne by leaving a certified copy thereof with each of them personally; and on the within named.....by leaving such copy at the usual place of residence of each of them, The other person within named not found. T. L. Mathews, U. S. Marshal By H. A. Homan, Deputy.'

32 On November 23, 1904, defendant was brought before me, the said Commissioner, at my office, in the City of Omaha in said District, by H. A. Homan Deputy U. S. Marshal; and the complaint was then and there fully read and explained to the said defendant, who thereupon, for plea said he is not guilty as charged in the said complaint.

And thereupon, on motion to that effect, made by the deffendant, this hearing was continued until the 20-28 & 29 day of Dec. 1904, and said defendant was required to give bond, pending examination, in the sum of Five Hundred Dollars, which he did do.

On Dec. 29, 1904, pursuant to the continuance of Dec. 20-28 1904, defendant present came on for hearing Alfred Kennedy, Thos. Britton, Glen Campbell, Frank Hahn are sworn and examined as witnesses for United States and Anna M. Sykes and defendant are sworn and examined for deft.

And, from the evidence of the said witnesses, it appearing to me, the Commissioner, that the laws of the United States have been violated, as charged in the complaint, and that there is good cause shown to believe the defendant guilty of the alleged offense, it was ordered that deft. Leo Hop be deported from the United States to the Empire of China, his native country. Said deportation be from the Port of San Francisco, that defendant be committed to the custody of United States Marshal to carry this order into effect. From said order defendant appeals to the District Court and enters into a bond in the sum of $500.00 for his appearance to said court Jany. 10, 1905, at 10 o'clock A. M.

The following certificate is endorsed thereon:

"The United States of America,
District of Nebr.—ss.

I, the undersigned, a United States Commissioner for said District, do hereby certify that the within is a full and true transcript of the proceedings had by and before me in the above named cause, and of the costs therein, as recorded in my docket 2 page 67; and that the papers numbered one to 9 inclusive, accompanying this transcript, are the original papers in said cause; all of which are herewith transmitted into the District Court of the United States, within and for said District.

Witness my hand on this 9th day of Jany., 1905.

GUSTAVE ANDERSON,
U. S. Commissioner as aforesaid.

33 Said transcript is further endorsed as follows:

"Filed Jan. 9 1905, R. C. Hoyt, Clerk."

Said Commissioner's additional and separate findings are as follows.

"That the said Liu Hop is a Chinese manual laborer, and was born in and is a subject to the [Emporer] of China; that he was found within the limits of the United States, to-wit, in the City of Omaha, Douglas County, State of Nebraska, in the District of Nebraska, on the 23rd day of November, A. D. 1904, and that when he was so found as aforesaid, the said Liu Hop was in possession of a certain certificate, proper in form, No. 179, registered in book three, folio 164, issued by the Colonial Secretary of Macau Province, by authority of H. E. Governor of said Province, and dated the 17th day of May, 1899, which said certificate among other things recites as follows:

'By order of H E the Governor, I grant this passport to a Chinaman Liu Hop, bachelor, natural and residing in Macua, student of Chinese literature for over 4 years, being his professor Lu-ioc-po, living in Rua dos Mercadores, No. 180, to go to the United States of America, in order to study there the English language and European sciences, and to live in the company of his brother Liu-eng-Fun, manager of the firm "Lun-Sing-Chong"—Rockspring Why—San Francisco Cal.'

That I find from the evidence adduced upon the hearing herein that the said Liu Hop landed in the City of San Francisco on or about July 3, 1899, and shortly thereafter and during said year of 1899 came to the City of Omaha, State and District of Nebraska, where he has ever since resided and still resides.

I further find that during the time of his residence in said City he has at all times been a common laborer and has at no time pursued the study of the English language beyond the merest rudiments taught by his Sunday School teacher, and has at no time pursued the study of European sciences or any other study except as to the rudiments of the English language: and that the said Liu Hop has at no time been a student within the meaning of the Act of Congress approved May 5, 1892, and Acts of Congress amendatory thereof, and that he is now unlawfully within the United States of America.

34

To all of which foregoing order and findings of the United States Commissioner, the said Liu Hop excepts and prays an appeal, and bail is fixed in the sum of $500.00; his certificate pending appeal to remain in the custody of the said United States Commissioner.

Witness my hand at my office in the City of Omaha, County of Douglas, State and District of Nebraska, this 30th day of December, A. D. 1904.

GUSTAVE ANDERSON,
United States Commissioner for the District of Nebraska, at Omaha, Nebr.

These findings are endorsed as follows:
"Filed Jan. 9, 1905, R. C. Hoyt, Clerk."

Said original student's certificate and translation thereof, with all endorsements and certificates thereon, under which defendant was admitted into and entered the United States, are as follows:—

Governo da Provincia de Macau.

Secretaria Do Governo da Provincia de Macau.

No. 179.
Registado no livro & 3 a fl. 164.

Mario Pires Monteiro Bandeira de Lima, Secretario geral do governo da provincia de Macau, por Sua Magestade Fidelissima que Deus Guarde, etc.

Por ordem de S Ex. o Governador concedo passaporte ao China Liu-hop, soeteiro, naturale residente em Macau, estudomte de lingua chinera ha 4 amuz, sendo o sen professor Li-ioc-po, nurce der sia Mercaccrez, N°. 180, paraos Estaaos Unidos da Hmerica a fim de dlli estuclara lingua inglesa e sciencias europeiaze viver em compcmlua do sen irmai Liu-Veng-fim gerente da firma "Lun-sing-chong." Rockspring, Wyo.—San Francisco, Cal.

Signaes:
Idade..... 20 annos.
Altrua..... 1 metro 590 ms.
Rosto..... conyuido.
Cabellos ... pretiz.
Sobr'olhos.. idem.
Olhos..... castaulm escuriz.
Nariz..... chato.
Boca..... grande.
Cor..... ad aracu asiatick.
Signaes particulares.
W.
Custo do passaporte $3.50.
(Likeness.)

Hlonace conyutemente.

E cumprindo com a obrigacao de fazer referendar este Passaporte pelo respectivo agente diplomatico ou consular, residente n'esta cidade: roro as auctoridades administrativas e a todas aquellas a quem pertencer o seu conhecimento, nao ponham embaraco algum ao portador.

Valoiso por tempo de trinta dias parasahir d'esta cidade.

Dado em Macau, aos 17 de Mcuv de 1899.

Com auctorisacao de S. Ex. o Governador.

O Secretario Geral do Governo,
MARIO BD. SUR.

Vise U. S. Consulate General Hongkong May 31 1899.

R. WILDMAN, *Consul Gen.*

Assignatura do portador,

LIU HOP.

Landed July 14 1899.
Ex S. S. Coptic July 3 1899.
San Francisco, Cal.

J. O. JACKSON, *Collector.*

(*Endorsements—Translation.*)

Government of Macau Province.

Colonial Secretary of Macau Province. No. 179. Registered in Book 3, folio 164.

Maria Pires Monteiro Bandeira de Lima, Colonial Secretary of Macau Province, His Majesty the King, &c., &c.

By order of H. E. the Governor, I grant this passport to a Chi-aman Liu-Hop, bachelor, natural and resident in Macau, student of Chinese litterature for over 4 years being his professor liu-ioc-po, living in Rua dos Mercadores, No. 180, to go to the United States of America, in order to study there the English language and European sciences, and to live in the company of his brother Liu-eng-Fun, manager of the firm "Lun-Sing-Chong"—Rockspring Wyo.—San Francisco—Cal.

Signals:

Age.....	20 years.
Height.....	1 m. 590 ms.
Face.....	Long.
Hair.....	Black.
Eyebrows..	do.
Eyes	Dark chestnut.
Nose	Flat.
Mouth.....	Big.
Color of the Asiatic race.	
Cost of passport, $3.50.	

Guaranteed.

Fulfilling the obligation to have this passport vised by the respective diplomatic or consular agent residing in this city, I beg to request the administratives authorities, and all those to whom it may concern, not to put any objection to the bearer.

Valuable for 30 days to leave this city.

Given at Macao on the 17th day of May 1899.

By Authority of H. E. the Governor.

The Colonial Secretary,

(Signed) MARIO B. DE LIMA.

Bearer's signature

(S'd) LIU-HOP.

Translated by A. M. Roza Peruia, Jr.

Vise U. S. Consulate General Hongkong May 31, 1899.

R. WILDMAN, *Consul Gen.*

(*Certificates.*)

Surveyor:

Land within named Chinese passenger on identification.
Jul- 14 1899.

J. P. JACKSON, *Collector.*

I certify that I have this day landed the within named Chinese passenger.

L. J. O'LEARY.

Certif.—5 Serial—249
Name—Liu Hop
Class—1st Visit
N°. 11358 Pagon patacas e trize avos d sello.
Place
Reparticas d Fazeuda do Concellio de Macau, 17 do Maisdo 1899.
Ex S. S. Coptic.
Registration—Jul- 3 1899
Oescrivas do fazemla.
Partnership
Rocha
Landed
Denied

O. RICIBIDOR.
LZ MARTINHO MARQUIS.

(*Certificates.*)

No. 181.

Consulate-General for Portugal.

I, Agostinho Guilherme Romano, Consul-General for Portugal, &c., at Hongkong, do hereby certify that the translation in English by A. M. Roza Pirura of the Certificate No. 179 issued by the Secretary General of Macao, is a true and correct one, and the signature and seal thereon are genuine.

In witness whereof, I have hereunto set my hand and affixed the Seal of my office, this 20th day of May 1899.

AGOSTINHO G. ROMANO,
Consul-General for Portugal.

[SEAL.]

Consular fees six shillings & eight pence.

W. A. O. MINUO.

The evidence taken before the commissioner was not reduced to writing or preserved, or in any manner presented to the district court. And no other or further evidence than above recited was offered by either party. Upon consideration whereof, after arguments by counsel for both parties, the court or judge on the same day filed an opinion and ordered the defendant deported, to all of which the defendant excepted.

And afterwards at said November term of court when notified of said decision, the defendant sought the assistance and employed other counsel, who thereupon at said term of court made oral application to the court for a new trial of said cause, and the court gave leave to make formal application in writing therefor, supported by showing.

And afterwards and on May 8, 1905, defendant's new and present counsel by leave of court filed said application and showing. And thereafter at the same or May term of court, said application for a new trial came on for hearing before the court, both parties being represented by their counsel, at which time no other evidence was offered or considered by the court than the original complaint, the aforesaid commissioner's transcript and additional or separate finding, and the original student's certificate and translation thereof, with all endorsements and certificates thereon, under which defendant was admitted into and entered the United States, and the defendant's application and showing, consisting of motion or petition and nine affidavits, which are as follows:

35

"In the District Court of the United States for the District of Nebraska.

The United States, Plaintiff,

N. 507 vs.

Liu Hop Fong, Defendant.

Petition for New Trial as to Both Law and Facts.

Comes now the defendant Liu Hop Fong and petitions the court, in order that justice may be done, for a new trial herein as to both the law and the facts, for the following reasons:

1. This matter was originally heard before Hon. Gustave Anderson a commissioner of this Court, upon the testimony of four witnesses, called by the United States and upon the testimony of one witness only besides this defendant, on his behalf, and no one of these witnesses, except the defendant was a Chinese or person with whom he has been associated and knows his habits and doings while in this country, so that the hearing was of the nature of an exparte proceeding without this defendant's rights being fully or properly presented for consideration. Furthermore, the evidence that was taken upon said hearing was not reduced to writing, and upon his appeal to this court, in which he was entitled to a trial de novo, his case was heard in his absence upon the findings made by the commissioner without this court having the benefit of the evidence produced before the commissioner or any evidence. And your petitioner claims that his rights were not fully or properly presented before this court; that very material evidence and considerations in his behalf were not presented to the commissioner or this court, as will be hereafter more fully stated; and that the findings of the commissioner and of this

Court, to the effect that the defendant is without right
36 to be or remain in this country, are contrary to law and are not sustained by the real facts and the true considerations applicable to this case.

2. The complaint or information, under which your petitioner was tried, and the only complaint made against him, was and is that he "is unlawfully within the United States of America", because he "is now pursuing the occupation of a common laborer, contrary to the laws of the United States of America". he charge therefore is very limited in scope, being limited to defendant's occupation at the present time. Your petitioner denies that he is now a common laborer or a laborer within the meaning of the treaties between the United States and China and the laws of the United States and the certificate under which the defendant came to this country. But he also contends that said complaint does not contain a sufficient ground for his expulsion from this country, in that it charges only that he "is now" a common laborer, but does not charge that he came into this country mala fide under a certificate entitling him to come as a student, but evertheless came with the sole intent of being a laborer when and while here, and has been such laborer ever since coming into this country, in circumvention of the laws and in fraud of the United States. The information being insufficient to raise the issue whether your petitioner's "coming" to this country was a fraud on the law, he should be discharged, for if his coming is lawful and not fraudulent, he is lawfuly here and entitled to remain.

3. The information being insufficient, as stated, your petitioer should have been discharged by the commissioner or by the court for that reason, and there being no charge in the information that your petitioner fraudulently intended to come, and fraudulently came, into this country under a false certificate for the purpose of becoming and being a common laborer here, there was no occasion for evidence on that subject, and no evidence directly on that subject was introduced before the commissioner, and that question was not tried before this court,
and your petitioner has never been heard on the vital
37 and necessary ground for his deportation, to-wit: Did he come into this country fraudulently to become a laborer here? Such ground is vital, for this court in this case found (basing his findings on the opinion of the Commissioner) that your petitoner had intentionally and fraudulently came into the United States as a student to become and be a common laborer and had been such laborer all the while here, and not a student.

4. By Art. 1 of the treaty with China of Dec. 18, 1894, which is still the supreme law of the land, it is "the coming" to this country of Chinese laborers, and not their remaining here, that is prohibited. Art. 2 preserves for these Chinese laborers who were then here the right to remain. Art. 3 provided that Art. 1 and 2 "shall not effect the right at present enjoyed of (all of those classes of) Chinese subjects, being officials, teachers, students (there) .... but not laborers (there) of coming to the United States and residing therein." This Art 3 did not create a new right, but recognized and protected an existing right of such persons to come here to reside. The certificate required by Art. 3 was not to limit such right, but to provide evidence to distinguish such comer from the laborer newcomer or other Chinese already residing here. No restrictions were placed on the official, teacher, or student, except that he bring a certificate of identificaton of himself and his class in China. And Congress has not sought to place any restrictions on, or to classify or define, teachers and students, although it has sought to define merchants. That Chinese persons, who are students there, have the original continuing right to come here to reside, is further evidenced by Art. 4, which, being intended to carry out Art. 3, of the treaty with China of Nov. 17, 1880, says: "It is hereby understood and agreed that Chinese laborers or Chinese of any other class either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights" etc; and Art. 2 of the treaty of Nov 17, 1880, provided: "Chi-
38 nese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation." So, if your petitioner was a student in China, he as such had an unrestricted right to come to this country under the classification of student, his coming was bona fide and lawful, and he has the right to remain and reside here permanently.

5. Your petitioner claims the right to be heard on the following questions, on which there ought to be an adverse finding before he is ordered deported from this country, to-wit:

Whether he was a student and belonged to the student or teacher class in China.

Whether the treaties and laws require a Chinese student, coming here for the purpose of learning to intend to learn the European sciences, and, if it does not, whether it is competent for the administrative officers to make such additional requirement of him, by putting it into his certificate, so as to render him liable to deportation if he does not learn such European sciences:

Whether his coming here as a student was with the bona fide intent to extend his learning, and to learn the English language and through the medium of the English language, learned here, to learn the European sciences:

Whether, coming here with such bona fide intent, there is any limit to the time in which he may continue such studies or within which he must master them, or any of them:

Whether there is any requirement or regulation as to the course, or kind, of teaching to be taken by him, or school to be attended, to acquire such learning:

Whether the course of learning to be pursued and the time to be used for that purpose are not left to his own dis-
39 cretion.

Whether the extent of his mastery of any of these learnings is not left to his own discretion and satisfaction:

Whether, having mastered the English language and European sciences, he must return to China or be liable to be deported:

Or whether, having come here with such bona fide intent as a student, and having pursued his studies here bona fide for several years, he may not afterwards abandon his purpose to complete such course of study to the fullest extent and yet have the right to continue to reside here, that is, whether he is obliged before leaving [Chine] to map out a complete plan of action for his whole life, part of which plan must be to return to China when he has completed his education, and not be permitted for any reason to abandon or depart from that plan while here:

And whether, while pursuing his bona fide intent to increase his learning and to learn the English language, he may not incidentally do some manual labor about the place of his residence for those with whom he makes his home.

6. Your petitioner claims and desires an opportunity to prove, that he was a student, and not a laborer, in China when he applied for a certificate of classification to bring with him to this Country; that his certificate was obtained in good faith

and his coming to the United States was in good faith as a student; that he has while here (though as he believes not necessary to his right to remain here) continued the pursuit of learning as his only occupation and has in good faith endeavored, in the way which seemed to him best, to learn the English language, and, by means of which, to acquire the ability to learn the European and other sciences and to acquire knowledge in general; that while here he has complied with the laws and has not been charged, prior to this proceeding, with offending against them; that he did not come here to be a laborer, and he has not been a laborer, within the meaning of that word in the treaties between the United States and China and the
40 laws of the United States, at any time since coming here and that he has done no manual labor here, except incidentally about the place where he resides and for those with whom he has made his home, but in no sense as a business or as a laborer, all of which your petitioner is ready to prove by himself and witnesses not called and who did not testify at the trial before the commissioner.

Wherefore, your petitioner prays that the court will vacate its findings and order heretofore made against him and will grant him a new trial upon both the law and the facts in order that justice may be done to him.

LIU HOP

By McCOY & OLMSTED and W. S. SUMMERS,
His Attorneys.

State of Nebraska,
County of Douglas.—ss.

Liu Hop, being first duly sworn, on oath states, that he is the person named in the foregoing petition as petitioner; that he knows the contents thereof; that he makes the claims therein made, and that the statements of fact therein contained are true.

LEO HOP FONG.

Subscribed in my presence and sworn to before me by Liu Hop this 1st day of May, 1905.

[Seal] DELORES McGAUGH,
Notary Public.

41 In the District Court of the United States for the District of Nebraska.

The United States, Plaintiff,
Doc. N. No. 507 vs.
Leo Hop Fong, Defendant.

Affidavit.

State of Nebraska,
County of Douglas—ss.

Leo Hop Fong, having been first duly sworn, on oath states that he is the defendant in the above entitled action and makes this affidavit in support of his application for a new trial herein.

Affiant states that he was born in Macau Province, China, and is now twenty-six years of age; and was twenty years old at the time of his coming to this country in 1899, the vessel on which he came arriving at San Francisco on July 4, 1899; that affiant's parents were Chinese and still live in China: affiant's father before affiant came to this country, and while affiant was growing up, was a school teacher, being a teacher of Chinese boys in private schools; that in China they had no public schools and that all education is taught in private schools, the families joining and contributing to the support of the teacher; that affiant was some of the time in his father's school when his father had a school near home; that his father was always a school teacher and never engaged in any other kind of business and was not a laborer in China and belonged to the class of school teachers: and that this affiant up to the time he came to this country when twenty years of age had never done any work, was not a laborer, but had been going to school and belonging to the teacher or student class in China, which was engaged solely in the obtaining and imparting of knowl-
42 edge; that affiant desired to come from China to the United States in order to increase his learning by study and travel, and not for the purpose of being a laborer, and with that object in view applied for a certificate as a student, as was his right, under the provisions of the treaty between the United States and China, and was given a certificate for that purpose; that affiant brought with him about Two Hundred ($200) Dollars in money, which his father had given him and his father also sent along with him a letter to affiant's brother at Rock Springs, Wyoming, and his uncle Leo Guy, his father's brother, living in Omaha, requesting them to do anything for affiant that was needed on his account; affiant remaining in San Francisco about one month and then came to Rock Springs, Wyoming, where he remained about two months. He left Rock Springs owing to the fact that his brother determined to go back to China, and affiant then came to Omaha and has resided in Omaha ever since, making his home with his uncle Leo Guy; that affiant's uncle Leo Guy has during all the time affiant has been here, been the owner and proprietor of the laundry located at No. 319 North 15th Street and had his home

in the rear of the building in which he had the laundry; and affiant's home has been with his uncle in the rear of said building; that affiant further states that upon coming to the United States he began at once trying to learn the English language and upon coming to Omaha, pursued the course which seemed to him best to attain that result, having no knowledge of particular customs here, (and no one either in China or since his coming here ever instructed him just what he should do to comply with the purpose of his coming here) he went to the Presbyterian Sunday School held in the Presbyterian Church in Omaha at the corner of 17th and Dodge Streets opposite the Post Office Building, and became a regular attendant of that sunday school and a member of the class of Chinese boys in that sunday school, and continued a member of that class for several years and all the while it was in existence; that
43 he at the same pursued his studies diligently through the week and attended the private school, one of his sunday school teachers Mrs. Anna M. Sykes kindly offered to teach him the English language; and affiant states that he was in the habit of going to her home daily for his lessons, and that Mrs Sykes would give him his lessons, unless sick or for some other reason unable to do so, or unless affiant himself was unable to go; that affiant has not been very strong physically and sometimes has not been well and did not feel able to pursue his studies continuously the year round; but affiant states that he has continued his studies faithfully and with the intent all the while as a student to become proficient in the English language, and to acquire a full, general knowledge and also a knowledge of European or other sciences, and affiant still has that intent and desire to carry out so far as he has the means and physical strength. Affiant states that he has never engaged in any labor while in the United States, but has always considered himself and held himself as a student, and will continue to pursue the object of his coming to this country, to learn the English language and to extend his learning of the sciences and of knowledge generally unless he is forcibly removed from this country and deported to China by order of this Court.

LEO HOP FONG.

Subscribed in my presence and sworn to before me by Leo Hop Fong this 1st day of May, 1905.

[Seal] DELORES McGAUGH,
Notary Public.

44 In the District Court of the United States for the District of Nebraska.

The United States, Plaintiff,
Doc. N. No. 507. vs
Leo Hop Fong, Defendant.

Affidavit.

State of Nebraska,
County of Douglas—ss.

Leo Guy having been first duly sworn on oath states that he knows the defendant Leo Hop Fong; that said Leo Hop Fong is his nephew, being the son of affiant's brother; that Leo Hop came to Omaha in the fall of 1899 as a student under a certificate permitting him as such to come to the United States; that since coming to Omaha the defendant has all the while resided with this affiant in affiant's home; that affiant has all the while been engaged in the laundry business as the owner and proprietor of a aundry located at 319 North 15th Street in the City of Omaha, at which place in the rear of the building is and has been affiant's home; that defendant Leo Hop Fong has been in no way interested in affiant's laundry or laundry business and has never been employed to do any work therein and has done no work therein; that defendant ever since coming to Omaha has been a student and has been engaged about his home in pursuing a course of study, and has been engaged at that and nothing else; that defendant pursued his studies under the direction and teaching of Mrs. Anna M. Sykes in Omaha and this affiant has a few times come with him to Mrs. Syles' home to receive his teaching; that defendant has not been well all the time and is not strong physically and is not able to work as much as a person of ordinary strength could; that in affiant's judgment defendant has pursued the proper course and has as affiant believes done well in his pursuit of the
45 English language and knowledge in general; that defendant can speak and understand English much better today [then] affiant can and better than most of the Chinamen here, although affiant has been in the United States since about 1877, but affiant never went to school; and affiant states that he knows it is to be the intention of defendant to continue his study of the English language and other studies as fast as he is able to do so, unless he is prevented by this court, ordering him deported from this country.

(Chinese signature) LEO GUY.

Subscribed in my presence and sworn to before me by Leo Guy this 1st day of May, 1905.

[Seal] DELORES McGAUGH,
Notary Public.

46 In the District Court of the United States, for the District of Nebraska.

The United States Pltf.,
No. 507 vs. Doc. N.
Leo Hop Fong, Deft.

Affidavit.

State of Nebraska,
County of Douglas.—ss.

Mrs. Anna M. Sykes being first duly sworn, on oath states that she makes this affidavit for the purpose of obtaining for the defendant a new trial of the action against him.

Affiant states that she has resided in Omaha about eleven years and has been a member of the First Presbyterian Church at 17th and Dodge Streets in Omaha, Nebraska, and has been a teacher in the Sunday School of that church during nearly all that time; that there has been in that Sunday school a class of Chinese boys composed of Chinese who have recently come here from China, the object of the Chinese class was to make them better citizens and especially to teach them the English language as well as christian principles; that the class met on every Sunday of the year, except perhaps a few Sundays in mid-summer and was conducted as a exercise in the study of the English language, the class using a prepared book for that purpose with the English and Chinese set opposite on the same page; affiant was a teacher of said class when the defendant Leo Hop Fong came to Omaha and she became acquainted with him in the class very soon after his coming and ever after that Leo Hop Fong was a regular attendant, that in addition to his attending the Sunday school class he also came to her residence during the week time and would come there day after day during the year as often as it was convenient for affiant to give him a lesson; he would come every day for that purpose unless
47 affiant notified him by telephone or otherwise not to come for a time because inconvenient for her; and perhaps he would not come because not physically able to come. The defendant is not physically strong and a good deal of the time was almost unable to pursue his studies, but nevertheless did so just as much as he was able, and often came in bad weather and in winter when affiant thought the defendant was really unable to come; affiant knows Leo Guy the uncle of the defendant and has known him a number of years and has been to Leo Guy's laundry dozens of times and has when there seen the defendant and never once saw him doing any labor and judging from what she knows of him and the frequency of his taking lessons from her, she believes that affiant did not do any labor, but was engaged wholly and faithfully in his work of

trying to learn the English language, and believes that the defendant's health was such that he would not be able to both labor and do as much work as he did in his class work with her; affiant states that so far as she knows no one ever advised the defendant to pursue any other course of study than in the said Sunday school and with her and affiant states that so far as she knows the defendant could not have pursued any course of study to any greater advantage than he obtained in his lessons in Sunday school and with her, for at Sunday school the whole teaching was devoted to his learning the English language and the only bible study was the learning of one verse each Sunday; affiant states that in her judgment the defendant was always while here endeavoring faithfully and in good faith to learn the English language and was doing nothing else and would now be attending school with her if it had not been that this prosecution for his deportation to China had been begun. The fall term of their teaching of the Chinese boys was about to open when this agitation for their removal to China was begun and that so upset and excited the boys that they could not well study and the school was not opened awaiting the time when the agitation for their removal would end, and as it has continued until this time, the
48 school has not opened; but affiant firmly believes that but for such agitation and complaint made against the defendant, he would have been going to school to her regularly through the fall and winter and until now and would have continued hereafter his studies; affiant believes that the defendant has learned very well and is showing good progress, as much so perhaps as any of the Chinese boys of affiant's acquaintance; affiant states that she was present at the trial before Judge Anderson and heard the defendant testifying and she states that the defendant was so nervous and excited that he was unable to do himself justice so far as showing his knowledge of the language is concerned, and was so frightened that he was unable to give really truthful answers; that is, answer that would be fair and truthful to himself and in affiant's judgment the defendant if given another opportunity to be heard before the court, will be able by himself and witnesses to show that he is complying fully with the law and is a bona fide student here, and is entitled to remain; affiant states that Mrs. Tilden was the Superintendent of the Chinese boys class in the Sunday school, and knows the defendant well, and will be able also to give testimony for him. This Chinese Sunday school class is a special class held in the afternoon and separate from the regular Sunday school, at which extra and special time is given to the class.

ANNA M. SYKES

Subscribed in my presence and sworn to before me by Mrs. Anna M. Sykes, this 1st day of May, 1905.

[Seal] DELORES McGAUGH,
Notary Public."

49 "In the District Court of the United States, for the District of Nebraska.

The United States, Plaintiff,
No. 507 vs. Doc. N.
Leo Hop Fong, Defendant.

Affidavit.

State of Nebraska,
County of Douglas.—ss

Mrs Ida V. Tilden, being first duly sworn, on oath states that she makes this affidavit for the purpose of obtaining for the defendant a new trial of the action against him.

Affiant states that she has resided in Omaha for many years and has been a member of the First Presbyterian Church at 17th and Dodge Streets in Omaha, Nebraska; that there has been in that Sunday school a class of Chinese boys composed of Chinese who have recently come here from China and that she has been Superintendent of that class; that in her work among the Chinese in Omaha she has been acquainted with nearly all of the Chinese here, and with their proficiency in the use of the English language; affiant states that the defendant was regularly enrolled as a member of said Chinese class on March 4, 1900; that she believes he was an attendant of the class for sometime before that, as it was their custom not to enroll a new Chinese attending the class until it became certain that he desired to become a regular member of the class, the class did not open that fall of 1899 until in November; affiant knows the defendant well and states that he was a regular attendant of said class and as she thought one of the brightest of the Chinese boys attending the class, owing perhaps to his having a better knowledge of his own language, the Chinese. Affiant states that she knows the defendant's uncle Leo Guy well and has been many times at his laundry at 319 No 15th Street, Omaha, Nebraska, in company with Mrs. Sykes, going either in the morning or afternoon when their coming
50 was not expected, and affiant states that she never saw the defendant doing any work and believes that he did not engage in any labor in or about the laundry, because during all the time she knew him his hands were soft and had the appearance of doing no manual labor and did not have the appearance or feeling of the hands of other Chinamen who were

laborers. Affiant states that defendant has not been well or strong and apparently has had tendency toward [pulminary] trouble, and could not have worked and kept up his studies too, as well as he did. Affiant states that said Chinese class has not been running during the last fall and winter owing to the fact of many prosecutions against the boys of the class being brought for their return to China, and they were so much upset by it that they were unable to take proper interest in their work, or work well; so the class was discontinued until the matters had been settled. It is desired to renew the class just as soon as the prosecutions are over and the boys are able to take up their studies again. Affiant states that in her judgment the defendant has in good faith given his best efforts to study and has been only a student and not a laborer while in this country and that in her judgment he has advanced as rapidly in learning the English language and acquiring knowledge generally as any of the Chinese boys here. Affiant now recalls that the defendant was seriously ill about Easter time two years ago and continued ill for several weeks, and was ill at other times.

IDA V. TILDEN

Subscribed in my presence and sworn to before me by Mrs. Ida V. Tilden this 3rd day of May 1905.

[Seal] DELORES McGAUGH,
Notary Public."

51 "In the District Court of the United States, for the District of Nebraska.

The United States, Plaintiff,
Doc. N. No. 507. vs.
Leo Hop Fong, Defendant.

State of Nebraska,
County of Douglas.—ss.

Alfred C. Kennedy, having been first duly sworn, in oath states that he was called as a witness for the United States in the above entitled action before Hon. Gustave Anderson, Commissioner, and at the trial testified that he had collected the rents at 319 No. 15th Street, Omaha, Nebraska, for several years and that the defendant who was present before Judge Anderson at the time was the one who in his judgment paid the rents; affiant desires now to say that he was mistaken in his opinion that the defendant was the person who paid the rent. Affiant saw defendant there before Judge Anderson, and thought defendant was the person who paid the rent; but affiant states that to-day he has seen the defendant at near view in company with other Chinamen, one of whom looks very much like de-

fendant and when seeing them together and close at hand, affiant says that he is not satisfied that it was not the defendant but this other Chinaman who paid the rent to him. Affiant states that he remembers having seen the defendant at the laundry at times when he went there to collect the rent, but is satisfied now that he is not the one who was in the habit of paying the rent.

ALFRED C. KENNEDY,

Subscribed in my presence and sworn to before me by Alfred C. Kennedy this 4th day of May, 1905.

[Seal] DELORES McGAUGH,
Notary Public."

52 "In the District Court of the United States, for the District of Nebraska.

The United States, Plaintiff,
No. 507 vs. Doc. N.
Leo Hop Fong, Defendant.

Affidavit.

State of Nebraska,
County of Douglas.—ss.

Thomas Britton having been first duly sworn, on oath states that he is a printer by trade and is employed at No 317 No. 15th Street, Omaha Nebraska, by the Potter Printing Company and has been employed there since April 1, 1905, that prior thereto he has been employed at 313 No 15th Street, Omaha, Nebraska, for two years and a half, affiant states that he walked by the Laundry at 319 No. 15th street every day or two during that time, and was in the laundry perhaps a dozen times to make change but otherwise paid no attention to the people who were in there; affiant states that he knows the old man, Leo Guy, very well; that affiant testified at the trial before Gustave Anderson that he did not know who owned the laundry, but knew the old man. Affiant states that the old man was in the court room at the trial before Judge Anderson and in giving his testimony affiant had reference altogether to the old man and no one else; that on yesterday when the defendant Leo Hop Fong was brought before affiant and affiant was asked whether he was the one about whom he was testifying, affiant stated and now states that he was not, that he did not know him and when the old man Leo Guy was brought before him affiant stated and now states that that was the man he knew and had reference to when he testified at the trial, and that he had not seen or taken any notice of the young man, the

defendant, before seeing him at the trial. Affiant says
53 that if he at the trial was understood to refer to the defendent, he did not mean it so and it was a clear mistake. Affiant states that he was asked only two questions, whether he knew the man in the laundry and whether he could pick him out. And he said he could and pointed toward the old man Leo Guy, and meant him and that was all that was asked of affiant at the trial.

THOS. BRITTON,

Subscribed in my presence and sworn to before me by Thomas Britton this 4th day of May, 1905.

[Seal] DELORES McGAUGH,
Notary Public."

54 "In the District Court of the United States, for the District of Nebraska.

The United States, Plaintiff,
No. 507 vs. Doc. N.
Leo Hop Fong, Defendant.

State of Nebraska,
County of Douglas.—ss.

Affidavit.

Frank Hahne, having been first duly sworn, on oath states that he is a printer by trade and has been employed since February, 1902, at 317 No 15th Street, Omaha, Nebraska, by the Potter Printing Co., affiant states that he was in the laundry at 319 No. 15th street, Omaha, Nebraska, perhaps once or twice a week during that time; that he would go in from the printing office to get money changed, or would go in to get old rags to be used in the printing office for cleaning type; that when he would go into the laundry he would see several Chinamen there, and had often see the defendant there; that when he went in to get money changed, the money would be changed either by the older man who appeared to be the owner, or by a younger man in the laundry who looks like the defendant, but was darker colored, but the defendant never made change for affiant, but defendant would at times go to get the old rags which affiant went in for; affiant on these visits would often see the defendant, but is certain that he never saw him either washing or ironing; affiant would see him standing about the room, and he was doing nothing more than sprinkling clothes if doing that; and affiant cannot say that he ever saw him sprinkling clothes even, and does not know that the defendant ever did any work in or about the laundry. Affiant states that at the trial before Judge Anderson he was asked if he

knew the defendant and knew his uncle and had seen them about the laundry and had seen the defendant work and
55 affiant testified that he had seen both the defendant and his uncle at the laundry and knew them, but could not say that he had ever seen the defendant doing any work and that was the substance and whole substance of his testimony before Judge Anderson. Affiant states that the defendant always looked pale and sickly as he does now, and affiant never thought he looked well or as if he was strong or in good health.

FRANK HAHNE.

Subscribed in my presence and sworn to before me by Frank Hahne this 4th day of May, 1905.

[Seal] DELORES McGAUGH,
Notary Ppblic."

56 In the District Court of the United States, for the District of Nebraska.

The United States, Plaintiff,
Doc. N. No. 507. vs.
Leo Hop Fong, Defendant.

Affidavit.

State of Nebraska,
County of Douglas—ss.

Glenn Campbell, having been first duly sworn, on oath states that he was a witness called by the United States in the above entitled matter in the trial before Judge Anderson. Affiant states that he has been employed at 317 No. 15th Street, Omaha, Nebraska, by the Potter Printing Company since February, 1902; that he testified at the hearing before Hon. Gustave Anderson that he had been in the laundry at 319 No. 15th street several times for the purpose of making change of small sums of money; and when in there he has seen the defendant and also other Chinamen there; that on one or two occasions at least the defendant himself made the change and affiant recollects that on one occasion the defendant [tryed] to make the change out of his own pocket, pulling out a few nickels and it being insufficient to make the change went then to the cash box in the laundry and made the change from that, and put affiant's money in place of it. This was the substance of affiant's testimony at the trial; affiant can not state that he ever saw defendant actually doing any labor in the laundry he was simply in there standing at one side against the benches, but whether he has been doing any labor or not affiant does not know. Affiant was in the laundry at no other time and knows nothing about the defendant than he has stated.

GLENN CAMPBELL.

Subscribed in my presence and sworn to before me by Glenn Campbell this 4th day of May, 1905.

[Seal] DELORES McGAUGH,
Notary Public.

57 In the District Court of the United States, for the District of Nebraska.

The United States, Plaintiff,
Doc. N. No. 507. vs.
Leo Hop Fong, Defendant.

Affidavit.

Frank L. McCoy, being first duly sworn, on oath, states that he knows the defendant, Leo Hop Fong and that said Leo Hop Fong several days after the opinion was filed in the above entitled cause by Judge Munger, the defendant came with another Chinamen, a client of affiants, to affiant and stated to affiant that he had been on trial for deportation to China and that Judge Munger had entered an order of deportation against him, and requesting affiant's assistance to procure him a new trial and if possible dicharged from the prosecution. Affiant said that he would look into the matter and do what he could for him. That was about the 18th or 19th day of April. Affiant then went to Judge Munger and stated the circumstances to him and that it seemed that he the defendant had not had a full or proper hearing before the Commissioner, or before the District Court, because the defendant's claims had not been fully or properly presented, and asked the court whether he would not give the defendant a new trial, in order that his case might be properly submitted to the Court. Judge Munger said he had no objections and would willingly try the case again, but told the affiant to make an application in writing in a formal way, supported by a showing. Nothing was said or thought of the court adjourning so soon, but it did adjourn on April 22nd. Affiant at once after seeing Judge Munger began working on defendant's application for a new trial. This was the first case of the kind affiant had had, and affiant was obliged to make exhaustive research of the law and investigation of the facts of the case, in order to be advised of the defendant's claims and the
58 justice thereof. Affiant continued this work faithfully and continuously, but was unable to complete it before May 1st, on which day the May term of court began; and in fact did not get his showing completed until May 4th. Affiant then submitted the application and showing to associate counsel for consideration and afterward on May 8th filed them.

FRANK L. McCOY.

Subscribed in my presence and sworn to before me by Frank L. McCoy, this 8th day of May, 1905.

[Seal] DELORES McGAUGH,
Notary Public.

59 The foregoing nine affidavits were fastened together and endorsed as follows:

"Doc. N. No. 507. In the District Court of the United States for the District of Nebraska. The United States vs. Leo Hop Fong. Affidavits of Leo Hop Fong, Leo Guy, Mrs. Anna M. Sykes, Mrs. Iva V. Tilden, Alfred C. Kennedy, Thomas Britton and Glenn Campbell, Frank Hahne, Frank L. McCoy. Filed May 8, 1905. R. C. Hoyt, Clerk."

Afterwards at said May Term of Court and on Oct. 27, 1905, upon consideration of said motion or petition for a new trial the Court filing an opinion, overruled the same, to which ruling the defendant excepted.

Now, in furtherance of justice and that right may be done, the defendant Leo Hop Fong presents the foregoing as his bill of exceptions in this case upon the matters arising at the original hearing, and also upon the motion or petition for a new trial and the hearing and decision thereon and prays that the same may be allowed, settled, signed and certified by the Court and made a part of the record in this case, as provided by law.

McCOY & OLMSTED,
Attorneys for Leo Hop Fong,

60 And now in furtherance of justice and that right may be done on application of the defendant, Leo Hop Fong the foregoing consisting of Thirty pages, numbered 1 to 30 both inclusive, and constituting all the evidence received and considered by the Court upon the original trial in the District Court upon the appeal from the commissioner, and all the evidence received and considered by the Court upon the hearing upon the motion or petition for a new trial, all in the case of The United States vs. Leo Hop Fong, Doc. N, No. 507, together with the exceptions to the Court's rulings, is by consent and agreement of the plaintiff hereby settled, allowed, signed and sealed by the Court as a true bill of exceptions of each and all thereof and is ordered and made a part of the record in said cause, and is hereby filed therein, all done this 26th day of December, 1905.

WM. H. MUNGER,
Trial Judge.

Endorsed: Filed Dec. 26, 1905, R. C. Hoyt, Clerk.

61 *Certificate.*

UNITED STATES OF AMERICA, *District of Nebraska, ss:*

Pursuant to the foregoing Writ of Error and in obedience thereto, I, R. C. Hoyt, Clerk of the District Court of the United States for the District of Nebraska, do hereby certify that the foregoing pages numbered from one (1) to —, inclusive, contain true and faithful transcript of the pleadings, process and proceedings of record and on file in said Court in the case of the United States of America *vs.* Leo Hop Fong, and that copies of the Writ of Error and Citation, duly certified, have been lodged and remain in my said office as such Clerk.

Witness my hand and seal of said United States District Court, at Omaha, in said District, this 4th day of January, 1906.

[Seal United States District Court, District of Nebraska.]

R. C. HOYT,
Clerk United States District Court, District of Nebraska.

Filed Jan. 6, 1906.
JOHN D. JORDAN, *Clerk.*

UNITED STATES OF AMERICA, *District of Nebraska, ss:*

I, R. C. Hoyt, Clerk of the District Court of the United States for the District of Nebraska, hereby certify that the foregoing is a true and correct copy of the Bill of Exceptions, as amended *nunc pro tunc*, pursuant to a Stipulation to Amend and Order allowing said Amendment filed herein.

Witness my hand and seal of said Court, at Omaha, in said District, this 18th day of December, 1906.

[Seal United States District Court, District of Nebraska.

R. C. HOYT, *Clerk.*

Thereupon afterwards, to-wit:—On the 30th day of November 1906, stipulation to amend Bill of Exceptions was filed in said Court, which said Stipulation is in words and figures following, to-wit:—

In the District Court of the United States for the District of Nebraska.

UNITED STATES OF AMERICA, Plaintiff,
vs.
LIU HOP FONG, Defendant.

Stipulation.

It is hereby stipulated and agreed that the bill of exception herein may be amended *nunc pro tunc* to supply the following matters inadvertantly omitted therefrom, as if the same had been originally made part of said Bill of Exceptions, to-wit:—

1. A copy of the original student's certificate and translation thereof, with all endorsements and certificates thereon, under which defendant was admitted into and entered the United States, the same to be attached to the original bill of exceptions on page four thereof as part thereof at the end of the Commissioner's additional and separate findings and being as follows, to-wit:

Governo da Provincia de Macau.

Secretaria Do Governo da Provincia de Macau.

No. 179.
Registado no livro 3" a fl. 164.

Mario Pires Monteiro Bandeira de Lima, Secretario geral do governo da provincia de Macau, por Sua Magestade Fidelissima que Deus Guarde, etc.

Por orden de S Ex. o Governador concedo passaporte ao China Liu hop, soeteiro, naturale residente em Macau, estudemte da lingua chinera ha 4 amuz, sendo, o sen professor Li ioc po, nurce dar sia Mercacurez, N°. 180, paraos Estcucios Unidos da Hmerica a fim de dsli estuclara lingua inglesa e sciencias europeioze, viver em compcinlua do sen irmai Liu Veng fun gerente da firma "Lun-Sing chong." Rocksprings, Wyo. San Francisco, Cal.

Hlonace conyutenlemente.

Signaes:
Idade..... 20 annos.
Altrua..... 1 metro 590 ms.
Rosto..... conyuido.
Cabellos ... pretiz.
Sobr'olhos.. idem.
Olhos..... carlaulm escurelz.
Nariz..... chato.
Boca..... grande.
Côr..... adaraça asiatick.
Signaes particulares.
W.
Custo de passaporta $3.50.
(Likeness.)

E cumprindo com a obrigação de fazer referendar este Passaporta pelo respectivo agente diplomatico ou consular, residente n'esta cidade: roro as auctoridades administrativas e a todas aquellas a quem pertencer o seu conhecimento, não ponham embaraço algum ao portendor.

Valioso por tempo de trinta dias parasahir d'esta cidade.

Dado em Macau, aos 17 de Mcuv de 1899.

Com auctorisacao de S. Ex. o Governador.

O Secretario Geral do Governo,
MARIO BD. SUR.

Vise U. S. Consulate General Hongkong May 31 1899.

R. WILDMAN, *Consul Gen.*

Assignatura do protador,

LUI HOP.

Landed July 14, 1899
Ex. S. S. Coptic July 3 1899.
San Francisco, Cal.

J. P. JACKSON, *Collector.*

(*Endorsements—Translation.*)

Government of Macau Province.

Colonial Secretary of Macau Province.

No. 179.
Registered in Book 3, folio 164.

Maria Pires Monteiro Bandeirs de Lima, Colonial Secretary of Macau Province, His Majesty the King, &c., &c.

By order of H. E. the Governor, I grant this passport to a Chinaman Liu-Hop, bachelor, natural and resident in Macau, student of Chinese literature for over 4 years, being his professor liu-ioc-po, living in Rua dos Mercadores, No. 180, to go to the United States of America, in order to study there the English language and European sciences, and to live in the company of his brother Liu-eng-Fun, manager of the form "Lun-Sing-Chong"—Rocksprings Wyo.—San Francisco—Cal.

Signals:
Age..... 20 years.
Height..... 1 m. 590 ms.
Face..... Long.
Hair..... Black.
Eyebrows.. do.
Eyes ..... Dark chestnut.
Nose ..... Flat.
Mouth..... Big.
Color of the Asiatic race.
Cost of passport, $3.50.

Guaranteed.

Fulfilling the obligation to have this passport vised by the respective diplomatic or consular agent residing in this city, I beg to request the administrative authorities, and all those to whom it may concern, not to put any objection to the bearer.

Valuable for 30 days to leave this city.

Given at Macao on the 17th day of May 1899.

By Authority of H. E. the Governor.

The Colonial Secretary,
(Signed) MARIO B. DE LIMA.

Bearer's signature
(S'd) LIU-HOP.

Translated by A. M. Roza Peruia, Jr.

Vise U. S. Consulate General Hongkong May 31, 1899.
R. WILDMAN, *Consul Gen.*

(*Certificates.*)

Surveyor:

Land within named Chinese passenger on identification.
Jul- 14 1899

J. P. JACKSON, *Collector.*

I certify that I have this day landed the within named Chinese passenger.

L. J. O'LEARY.

Certif.—5 Serial—249
Name—Liu Hop
Class—1st Visit
N°. 11358 Pagon patacas e treze avos d sello.
Place
Reparticas d Fazeuda do Concellio de Macau 17 do Maisdo 1899
Ex. S. S. Coptic.
Registration—Jul- 3 1899
Oesceivas do fazenda
Partnership
Rocha
Landed
Denied

O. RICIBIDOR.
LZ MARTINHO MARQUIS.

(*Certificate.*)

No. 181.

Consulate-General for Portugal.

I, Agostinho Guilherme Romano, Consul-General for Portugal, &c., at Hongkong, do hereby certify that the translation in English by A. M. Roza Pirura of the Certificate No. 179 issued by the Secretary General of Macau, is a true and correct one, and the signature and seal thereon are genuine.

In witness whereof, I have hereunto set my hand and affixed the Seal of my office, this 20th day of May 1899.

AGOSTINHO G. ROMANO,
[SEAL.] *Consul-General for Portugal.*

Consular fees six shillings & eight pence.

R. A. MINUO.

2. The words "and the original student's certificate and translation thereof, with all endorsements and certificates thereon, under which defendant was admitted into and entered the United States" to be added on page one of the bill of exceptions at the end of the first paragraph thereon as a part thereof by interlineation.

3. The words "the original complaint" after the words "than" and "and the original student's certificate and translation thereof, with all endorsements and certificates thereon, under which defendant was admitted into and entered the United States" after the word "finding," all to be added in page four of the bill of exceptions in the last sentence thereon as part thereof by interlineation.

And it is further stipulated that said original certificate with its

translation and endorsements and certificates be certified by the court to the Supreme Court for its inspection.

A. W. LANE,
Ass't U. S. Att'y, Attorney for Plaintiff.
McCOY & OLMSTEAD,
Attorney for Defendant.

Omaha, Nebraska, November 30, 1906.

Endorsed: Filed Nov. 30, 1906. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit:—At the November Term, 1906, on the 30th day of November, 1906, Order to Amend Bill of Exceptions, and certify to the U. S. Supreme Court, as per Stipulation, was duly signed and filed in said case, and duly entered of record therein, which said Order is in words, and figures following, to-wit:—

In the District Court of the United States for the District of Nebraska.

UNITED STATES OF AMERICA, Plaintiff,
vs.
LIU HOP FONG, Defendant.

Order.

This cause coming on duly to be heard by the Court on this 30th day of November, 1906, upon the application of the defendant and stipulation of the parties for the amendment of the bill of exceptions herein *nunc pro tunc* in the manner and for the reasons stated therein, on consideration said application is sustained and it is ordered that said bill of exceptions be amended now as of its date and in the manner and respect stated in said stipulation so that said bill of exceptions as so amended will be and appear as if said amendments had been incorporated in it as originally settled and allowed and the clerk is directed to make said amendments.

And it is further ordered, in pursuance of said stipulation, that the original student's certificate with its translation and all endorsements and certificates under which defendant entered the United States be certified by the clerk of this court and sent to the Supreme Court with the record herein for its inspection and use in the hearing of this case in that court.

By the Court,

WM. H. MUNGER, *Judge.*

Endorsed: Filed Nov. 30, 1906. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit:—On the 1st day of December 1906, Petition for Writ of Error was filed in said case, which said Petition is in words and figures following, to-wit:—

In the District Court of the United States for the District of Nebraska.

UNITED STATES OF AMERICA, Plaintiff,
vs.
LIU HOP FONG, Defendant.

Petition for Writ of Error.

Now comes the defendant, Liu Hop Fong, and states that on the 13th day of April, 1905, and October 27th, 1905, the Court entered judgment or sentence herein against him in favor of the plaintiff, in which judgment or sentence and the proceedings had prior thereto in this case certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the defendant prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the errors herein complained of and that the transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court and that said judgment or sentence be superseded during the pendency of said appeal.

McCOY & OLMSTED,
Attorneys for Liu Hop Fong.

Endorsed: Filed Dec. 1, 1906. R. C. Hoyt, Clerk.

On the said 1st day of December, 1906, Assignment of Errors was filed in said Case, which said Assignment of Errors is in words and figures following, to-wit:—

In the District Court of the United States for the District of Nebraska.

UNITED STATES OF AMERICA, Plaintiff,
vs.
LIU HOP FONG, Defendant.

Assignment of Errors.

Comes now the defendant, Liu Hop Fong, and makes the following assignment of errors for the purpose of hearing of this case on appeal and error in the Supreme Court of the United States.

1.

The complaint against the defendant in this case was and is insufficient in substance to constitute a valid complaint and is therefore void and insufficient to sustain the order of deportation made against the defendant, in that the charge that "the defendant is unlawfully within the United States of America" is limited, by the

further and qualifying statement, to mean that the defendant is unlawfully here because he "is now pursuing the occupation of a common laborer" in view of which qualifying and limiting statement it was incumbent on the complaint further to have alleged, which it failed to do, that while the defendant came here under a certificate entitling him to come as a student, nevertheless he was a laborer in China and came *mala fide* and with the sole and fraudulent intent of being a laborer when and while here and has been ever since coming into this country and is now such laborer, and the court erred in assuming or holding the complaint sufficient and in ordering the defendant's deportation thereon.

2.

The question whether defendant was one of the teacher or student class in China and came lawfully into this country was not in issue by the complaint and was not tried, and could not be decided by the court, and it was error for the Court to order the defendant deported without hearing on that question.

3.

The trial before the district court or judge being *de novo,* and the evidence taken before the commissioner not being preserved, the court erred in hearing and deciding the case against the defendant upon the findings of the commissioner alone and without the taking of new and additional sufficient evidence.

4.

The so called additional separate findings of the commissioner had no legal status and were void and incompetent as evidence and should not have been received or considered by the district court or judge, and should not be considered by the Supreme Court.

5.

There was no sufficient competent evidence before the district court to sustain its finding that the defendant was not a student and that he did not some here *bona fide* as or to be a student, but that his coming was *mala fide* and fraudulent and his principal purpose being to be a laborer here.

6.

The court erred in finding and holding that defendant was not a student and did not come here *bona fide* as a student, but came here as and to be a laborer, because of a wrong construction given by the court to the treaty of December 8, 1894 with China and especially to the words "teacher" and "student" therein, in that the court held that the treaty did not protect the right of a Chinese of the teacher or student class there, preserved by the treaty, to come to this country for any purpose or give him any better or different right to come here than a Chinese of the laboring class there whose coming except under certain specific conditions, was prohibited, the court in effect construing the words "teacher" and "student" out of the treaty and put-ing all Chinese of the teacher and student classes

in China down into the cooley or laboring class there who were by the treaty purposely and expressly denied the right to come and remain here except under the certain conditions therein stated.

7.

The court erred in ordering the defendant deported, because of its misconstruction of the treaty with China and laws and because of its failure to find that the defendant was not one of the privileged teacher or student class in China, and did not distinguish his unrestricted right as one of the student or teacher class there to come and remain here from the restricted right of the prohibited laboring or cooley class there to come and remain here only on the conditions specified in the treaty.

8.

There being insufficient evidence to sustain the finding that the defendant came into this country, not with the main and *bona fide* purpose of being a student, but with the main and fraudulent purpose of being a laborer here, there was no sufficient evidence to sustain the order of deportation of the defendant.

9.

The Court erred in ordering the defendant deported, because the defendant was a student and belonged to the student or teacher (and not laboring) class in China and was as such entitled to come and remain here.

10.

The court erred in holding that the treaty with China and laws in force when the defendant came here in 1899 required a Chinese student, coming here for the purpose of learning, to intend to learn the European sciences, and that it is competent for the administrative officers to make such additional requirement of him by putting it into his certificate, so as to render him liable to deportation if he did not learn such European sciences.

11.

The Court erred in holding that the defendant came here not with the *bona fide* intent to extend his learning and to learn the English language, but with the main intent to be a laborer.

12.

The Court erred in giving due importance and weight to the length of defendant's residence here, in connection with the character of defendant's schooling or method of learning, in deciding against the *bona fide* of his coming as a student.

13.

The Court erred in finding and holding that the character of defendant's schooling here was not a compliance with the treaty and laws, because the treaty and laws made no requirement or regulation

as to the course or kind of teaching to be taken by him, or school to be attended, to acquire such learning.

14.

The Court erred in finding and holding that the character of defendant's schooling here was not a compliance with the treaty and laws, because the course of learning to be pursued and the time to be used for that purpose are by them left to his own discretion.

15.

The Court erred in finding and holding that the character of defendant's schooling here was not a compliance with the treaty and laws, because the extent of his mastery of any of the learnings is by them left to his own discretion and satisfaction.

16.

The Court erred in finding and holding that the character of defendant's schooling here was not a compliance with the treaty and laws, because even if he had mastered the English language and European sciences, he would not be obliged to return to China or be liable to be deported.

17.

The Court erred in finding and holding that the character of defendant's schooling here was not a compliance with the law, because having come here with such *bona fide* intent as a student, and having pursued his studies here *bona fide* for several years, he could afterwards abandon his purpose to complete such course of study to the fullest extent and yet have the right to continue to reside here, and he was not obliged before leaving China to map out a complete plan of action for his whole life, part of which plan must have been to return to China when he completed his education and not be permitted for any reason to abandon or depart from that plan while here.

18.

The court erred in finding and holding that defendant is a laborer, and not a student, because defendant belonged by birth to the student or teacher class, and not to the laboring class in China, and has been at no time while here a laborer.

19.

The court erred in denying defendant's application for a new trial, because the evidence was insufficient to sustain the finding that the defendant's main purpose in coming to this country was to be a laborer.

20.

The court erred in denying the defendant a new trial on the ground that the court had no power to grant an application for a new trial filed after the adjournment of the term.

21.

The court erred in denying the defendant a new trial, because its action in so doing was an abuse of its legal discretion in the premises.

Wherefore, the defendant prays that the order of deportation be reversed and vacated and that he be discharged from custody or be granted a new trial.

McCOY & OLMSTED,
Attorneys for Liu Hop Fong.

Endorsed: Filed Dec. 1, 1906. R. C. Hoyt, Clerk.

Thereupon afterwards, to-wit: On the said 1st day of December, 1906, Appearance Bond was filed in said case, which said Bond is in words and figures following, to-wit:—

Appearance Bond.

Know All Men By These Presents:—That we, Liu Hop Fong, as principal and Joe Lee and Leo Lun as sureties, are held and firmly bound unto the United States of America in the full and just sum of Eight Hundred Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally with these presents.

Sealed with our seals and dated this 1st day of December in the year of our Lord one thousand nine hundred and six.

Whereas, lately at the November 1904 Term and at the May 1905, Term of the District Court of the United States for the District of Nebraska, in a suit pending in said court between the United States of America, plaintiff, and Liu Hop Fong, defendant, a judgment or sentence was rendered against the said Liu Hop Fong and the said Liu Hop Fong has obtained a writ of error from the Supreme Court of the United States to reverse the said judgment or sentence in the aforesaid suit and a citation directed to the United States of America, citing and admonishing the United States of America to be and appear in the Supreme Court of the United States at the City of Washington, D. C. thirty days from and after the date of said citation, which citation has been duly served.

Now the Condition of the above obligation is such that if the said Liu Hop Fong shall appear, either in person or by attorney, at the Supreme Court of the United States on such day or days as may be appointed for the hearing of said cause in said court and prosecution of his said writ of error and shall abide by and obey all orders made in the Supreme Court of the United States in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment or sentence against him shall be affirmed; and if he shall appeal for trial in the District Court of the United States for the District of Nebraska on such day or days as may be appointed for re-trial by said District Court and abide by and obey all orders made by such court, pro-

vided the judgment shall be reversed by the Supreme Court of the United States; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

LEO HIP FONG. [SEAL.]
JOE LEE. [SEAL.]
LEO LUN. [SEAL.]

Approved
WM. H. MUNGER,
Judge of the District Court for the District of Nebraska.

STATE OF NEBRASKA, *County of Douglas, ss:*

Joe Lee and Leo Lun, sureties on the foregoing bond, each being duly sworn, deposes and says that he resides at Omaha, Nebraska.

That each one is worth the sum of Sixteen Hundred ($1600.00) Dollars over and above all his debts and liabilities in property subject to execution and sale, and that their property consists of Lease holds and personal property in Omaha, Nebraska, 404 South 13th St. and 1204 Douglas St.

(Affiants' Signature.)

JOE LEE.
LEO LUN.

Sworn and subscribed to before me this 1st day of December, 1906.

[SEAL.] F. A. MOORE,
Deputy Clerk U. S. District Court for the District of Nebraska.

Endorsed: Filed Dec. 1, 1906. R. C. Hoyt, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judge of the District Court of the United States for the District of Nebraska, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the November Term, 1904, thereof, and May Term, 1905, thereof, betwen The United States of America, as plaintiff, and Liu Hop Fong, as defendant, a manifest error has happened, to the great damage of the said Liu Hop Fong as by the record and proceedings and assignment of errors appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the city

of Washington, D. C., and filed in the office of the Clerk of the Supreme Court of the United States on or before the 31st day of December, 1906, to the end that the record and proceedings aforesaid be inspected. The Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of December, in the year of our Lord, One Thousand Nine Hundred and Six.

Issued at office in the City of Omaha, Nebraska, with the seal of the District Court of the United States for the District of Nebraska, dated as aforesaid.

R. C. HOYT,
Clerk District Court United States, District of Nebraska.

Allowed by
WM. H. MUNGER,
United States District Judge, District of Nebraska.

[Endorsed:] No. 507 N United States District Court, District of Nebraska. United States of America *vs.* Liu Hop Fong. Writ of Error. To the District Court of the United States for the District of Nebraska. Filed at —— M. Dec. 1, 1906. R. C. Hoyt, Clerk.

Return to Writ.

UNITED STATES OF AMERICA, *District of Nebraska, ss:*

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of said District Court, at office in the City of Omaha, this 24th day of December A. D. 1906.

R. C. HOYT,
Clerk of said Court.

Supreme Court of the United States.

Citation (Error).

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., in thirty (30) days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States for the District of Nebraska, wherein Liu Hop Fong — Plaintiff in error, and you are defendant in error, to show

cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, this 1st day of December, in the year of our Lord one thousand nine hundred and six.

W. H. MUNGER,
United States District Judge for the District of Nebraska.

Service of the above Citation acknowledged and accepted this 1st day of December, 1906.

A. W. LANE,
Ass't U. S. Attorney, District of Nebraska.

[Endorsed:] No. 507 Doc. N United States District Court, District of Nebraska. United States of America *vs.* Liu Hop Fong. Citation. Filed at —— M. Dec. 1, 1906. R. C. Hoyt, Clerk.

Certificate.

UNITED STATES OF AMERICA, *District of Nebraska, ss:*

Pursuant to the foregoing Writ of Error and in obedience thereto, I, R. C. Hoyt, Clerk of the District Court of the United States for the District of Nebraska, do hereby certify that the foregoing pages, numbered from One (1) to Fifty-two (52) inclusive, contain true and faithful transcript of the pleadings, process and proceedings of record and on file in said Court in the case of the United States of America *vs.* Leo Hop Fong, No. 507 N, and I further certify that the original student's certificate, mentioned in the Order of Court, is hereto attached, and that copies of the Writ of Error and Citation, duly certified have been lodged and remain in my said office as such Clerk.

Witness my hand and seal of said United States District Court, at Omaha, in said District, this 24th day of December, 1906.

[Seal United States District Court, District of Nebraska.]

R. C. HOYT, *Clerk.*

Endorsed on cover: File No. 20,501. Nebraska D. C. U. S. Term No. 181. Liu Hop Fong, plaintiff in error, *vs.* The United States. Filed December 27th, 1906. File No. 20,501.

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 181
(20501)

LIU HOP FONG, *Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA.

Error to United States District Court, District of Nebraska.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is a proceeding to review the action of the District Court of the United States for the District of Nebraska adjudging that plaintiff in error is unlawfully in the United States and ordering him deported to China.

The questions before the court are: What is the true meaning and proper construction of the *Treaty* of Dec. 8, 1894, between the United States and China? and whether, within the true meaning of said Treaty, plaintiff in error came here of right, as one of the student or teacher class in China, or came in good faith to be a student? and, if the latter, whether his attending private school, instead of our public schools, was and is a compliance with the Treaty and the laws in that respect? And

if these questions be answered in the affirmative, then he is entitled to be and remain in the United States and the order for his deportation should be reversed.

The Treaty of Dec. 8, 1894, so far as applicable here, is as follows:

> "Art. I. The High Contracting Parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this Convention, the *coming,* except under the conditions hereinafter specified, of *Chinese laborers* to the United States shall be *absolutely prohibited.*
>
> "Art. II. The preceding Article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. . . . And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required.
>
> "Art. III. The provisions of this Convention *shall not affect the right* at present enjoyed of *Chinese subjects,* being officials, *teachers, students,* merchants or travellers for curiosity or pleasure, but not laborers, of *coming* to the United States and *residing therein. To entitle such Chinese subjects* as are above described *to admission* into the United States, *they may produce a certificate* from their Government or the Government where they last resided vised by the diplomatic or consular representative of the United States in the country or port whence they depart.
>
> "Art. IV. In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880, (the 15th day of the tenth month of Kwanghsu) it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United

States, shall have for the protection of their person and property all rights that are given for the protection of their person and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States."

The Treaty of Nov. 17, 1880, which was superseded by the Treaty of Dec. 8, 1894, throws light on the meaning of the latter Treaty, and, so far as pertinent here, is as follows:

"Art. I. Whenever in the opinion of the Government of the United States the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"Art. II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.

"Art. III. If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

And these treaty rights of Chinese students or teachers, or Chinese of those classes, have not been limited or affected by any subsequent treaty or legislation of Congress.

The *facts of this case* are, simply, except as they may be more fully stated in connection with the argument, that Liu Hop Fong is a young man who when he came to this country in 1899 was 20 years of age, and came here *of right* as one of the student or teacher class in China and as a student. He brought with him a student's certificate, dated May 17, 1899, regular in form, as evidence of his right to come and be here, and under it was permitted to land. (Rec. 15a-15d). He arrived in San Francisco July 3, 1899, was landed July 14, 1899, and soon thereafter proceeded to Rock Springs, Wyoming, where he had a brother living, engaged in mercantile business. Two months thereafter, that brother returning to China, plaintiff in error came to Omaha where he had an uncle living and where he has since resided. Since coming to Omaha plaintiff in error had attended a private school, and had been attending such school when he was arrested in this proceeding; he had not been a laborer and his conduct and habits had been in every way exemplary.

But on Nov. 23, 1904, the United States attorney for the District of Nebraska filed with the United States

Commissioner at Omaha a sworn complaint (Rec. 2) stating that plaintiff in error "*is unlawfully* within the United States of America" because he "*is now* within the district of Nebraska and living and residing at 319 North Fifteenth Street, Omaha, Nebraska, and *is now* pursuing the occupation of a common laborer, contrary to the laws of the United States of America" and praying "that he may be arrested and dealt with according to law."

On the same day plaintiff in error was arrested at Omaha and taken before United States Commissioner Anderson, (Rec. 13) and he then pleaded not guilty. On Dec. 29, 1904, hearing was had before the commissioner, when Alfred C. Kennedy, Thomas Britton, Glenn Campbell and Frank Hahne were sworn and testified for the United States, and Anna M. Sykes and defendant were sworn and testified for him. Besides this oral evidence there was also introduced the original certificate, under which plaintiff in error was landed and permitted to enter the United States, together with all the endorsements thereon. Said commissioner, however, on the same day, deciding the case, found that plaintiff in error's presence here was unlawful and ordered him deported to China. On the same day the plaintiff in error gave notice of appeal to the said District Court, the commissioner fixed his bond for appeal, which was given and approved, and also on the same day the commissioner wrote up, completed and signed his docket showing the above facts.

On the next day, December 30, at the request of the United States attorney, the commissioner signed a paper purporting to be special findings to the effect that plaintiff in error, though he was duly landed under his certificate, was in fact a Chinese manual laborer and had been such laborer all the time while in this country, and

that he was not a student within the meaning of the treaty and the law. (Rec. 14-15). This paper we claim is no part of the commissioner's record and is absolutely void and incompetent as evidence.

The commissioner then filed the original complaint and warrant and the commissioner's transcript of his record with the clerk of the said District Court, and also filed with the clerk said purported additional or special findings of December 30th.

This appeal came on in due time, on April 13, 1905, for trial before the United States District Court and was tried and decided, and the District Judge filed an opinion with findings and entered judgment in the case, affirming the commissioner's judgment and ordering the plaintiff deported, to all of which plaintiff in error excepted. (Rec. 3-4). The opinion bears on its face conclusive evidence that the findings therein against plaintiff in error followed and were based on the void, pretended findings of December 30th and that that was the only support for the opinion and judgment, for the record shows (Rec. 12) that the case was tried in the District Court "without taking any evidence and merely upon the complaint, the transcript of his proceedings made by the United States commissioner, from whose order the case was appealed, and the additional separate findings made by said commissioner, and the original student's certificate and translation thereof, with all endorsements and certificates thereon, under which defendant was admitted into and entered the United States;" no record of the evidence taken before the commissioner having been made or preserved.

And the November, 1904, term of the District Court adjourned April 22, 1905. (Rec. 4).

When plaintiff in error learned that the District Court also had ordered his deportation he sought and employed different counsel, his present counsel, McCoy & Olmsted, who on May 8th filed an application for a new trial, and filed therewith affidavits of plaintiff in error, his uncle Leo Guy, Ida V. Tilden, Frank L. McCoy, and said Anna M. Sykes, Alfred C. Kennedy, Thomas Britton, Glenn Campbell and Frank Hahne. (Rec. 16-32). This application set out the bona fides and rightfulness, under the Treaty with China and other laws, of plaintiff in error's coming to the United States and of his right to remain therein unmolested, and questioned the sufficiency of the complaint, as a basis for the judgment of deportation, for want of allegations therein averring that he was a laborer and not one of the student or teacher class in China, that his student's certificate was obtained fraudulently and that his entry under it into the United States was male fide and fraudulent, in order that he might become a laborer here, and not a student. The affidavits fully supported the application. Furthermore, the affidavits of said Kennedy, Britton, Campbell and Hahne show that their testimony before the commissioner had not been unfavorable to plaintiff in error and would, in case of a new trial, be in his favor. Respecting their evidence at the trial before the commissioner and as giving the facts these witnesses said:

> Alfred Kennedy says (p. 27): That his testimony before the commissioner was to the effect that defendant, whom he saw in the commissioner's room at the trial, was the one who paid the rent to him for his uncle's laundry. But he says that having since seen the defendant with another Chinaman who resembles him, he is now satisfied that it was not the defendant but the other Chinaman who paid the rent.
>
> Thomas Britton says (p. 28): That he was asked at the trial only two questions, whether he knew the

man in the laundry and could pick him out. He knew defendant's uncle very well, whom he had seen in the laundry. His uncle attended the trial and witness in his testimony referred solely to the uncle, and did not know or refer to the defendant.

Frank Hahne says (p. 29): That he was asked whether he knew defendant and his uncle and had seen them in the laundry, and that he testified that he had seen both of them in the laundry and knew them, but could not say that he had ever seen the defendant doing work. He also states that he had gone in to get money changed or to get old rags, but the uncle or another young man in there, who looked some like the defendant, but was darker colored, always made the change for him; and that defendant always looked pale and sickly and as if he was not strong or in good health.

Glenn Campbell says (p. 30): That the substance of his testimony before the commissioner was that he had gone into the laundry to make change and sometimes the defendant had changed small sums for him out of his pocket, but never out of the cash box, and that he could not say that he had ever seen the defendant doing work.

The application was afterwards heard, the District Judge considering only the records and papers he had before considered, as well as said application and affidavits (Rec. 16), and on October 27, 1905, was denied and plaintiff in error was again ordered deported, to which he excepted. (Rec. 5). The Judge filed an opinion in which he held that, as the judgment term had ended before the application for a new trial was filed, the judgment had become final so far as his power to review or vacate it was concerned, but he also said, being still influenced by said purported findings of the commissioner of December 30th, that he thought plaintiff in error was not a student within the meaning of the Treaty and law and that his coming to the United States was a fraud and he should be deported.

Thereafter, on December 1, 1906, and within two years from the entry of judgment of deportation on April 13, 1905, plaintiff in error filed in said District Court his petition for writ of error and assignment of errors and bond for appeal of said cause to this Court, which petition was duly allowed.

Plaintiff in error claims that he came lawfully into this country, that he has done nothing since coming here for which he should be deported, and is therefore entitled to be and remain here.

The prosecution, we contend, not only failed to state in its complaint a sufficient charge or ground for plaintiff in error's deportation, the charge in legal effect being a nullity, but also failed both before the commissioner and the District Court to offer or produce sufficient evidence, if the complaint had been sufficient, to overcome the effect of his certificate and of his being permitted to land thereunder, and therefore there was not sufficient evidence to warrant a finding for and judgment of deportation. We did not at that time represent plaintiff in error, not having been employed by him until after the District Court had ordered him deported. But the record and bill of exceptions show the complaint and all the evidence received and considered by the District Court on the trial before it on April 13, 1905, which was as matter of law and in fact a trial de novo, and these, we contend, show that the finding and order of deportation were clearly unwarranted.

This Court has jurisdiction of this appeal direct from the District Court, because in its decision and judgment there was and is necessarily involved the true construction of the Treaty with China of Dec. 8, 1894. Act of Cong. Mar. 3, 1891, Sec. 5.

Assignment of Errors.

1.

The complaint against the defendant in this case was and is insufficient in substance to constitute a valid complaint and is therefore void and insufficient to sustain the order of deportation made against the defendant, in that the charge that "the defendant *is unlawfully* within the United States of America" is limited, by the further and qualifying statement, to mean that the defendant is unlawfully here because he "*is now* pursuing the occupation of a common laborer" in view of which qualifying and limiting statement it was incumbent on the complaint further to have alleged, which it failed to do, that while the defendant came here under a certificate entitling him to come as a student, nevertheless he was a laborer in China and came mala fide and with the sole and fraudulent intent of being a laborer when and while here and has ever since coming into this country been and is now such laborer; and the court erred in assuming or holding the complaint sufficient and in ordering the defendant's deportation thereon.

2.

The question whether defendant was one of the teacher or student class in China and came lawfully into this country was not in issue by the complaint and was not tried, and could not be decided by the Court, and it was error for the Court to order the defendant deported without hearing on that question.

3.

The trial before the District Court or Judge being de novo, and the evidence taken before the commissioner

not being preserved, the Court erred in hearing and deciding the case against the defendant upon the findings of the commissioner alone and without the taking of new and additional sufficient evidence.

4.

The so called additional separate findings of the commissioner had no legal status and were void and incompetent as evidence and should not have been received or considered by the District Court or Judge, and should not be considered by the Supreme Court.

5.

There was no sufficient competent evidence before the District Court to sustain its findings that the defendant was not a student and that he did not come here bona fide as or to be a student, but that his coming was mala fide and fraudulent and his principal purpose being to be a laborer here.

6.

The Court erred in finding and holding that defendant was not a student and did not come here bona fide as a student, but came here as and to be a laborer, because of a wrong construction given by the court to the *Treaty* of December 8, 1894, with China and especially to the words "teacher" and "student" therein, in that the Court held that the Treaty did not protect the right of a Chinese of the teacher or student class there, preserved by the Treaty, to come to this country for any purpose or give him any better or different right to come here than a Chinese of the laboring class there whose coming, except under certain specified conditions, was prohibited, the court in effect construing the words "teacher" and "student" out of the Treaty and putting all

Chinese of the teacher and student classes in China down into the cooley or laboring class there who were by the Treaty purposely and expressly denied the right to come and remain here except under the certain condition therein stated.

7.

The Court erred in ordering the defendant deported, because of its misconstruction of the Treaty with China and laws and because of its failure to find that the defendant was not one of the privileged teacher or student class in China, and did not distinguish his unrestricted right as one of the student or teacher class there to come and remain here from the restricted right of the prohibited laboring or cooley class there to come and remain here only on the conditions specified in the Treaty.

8.

There being insufficient evidence to sustain the finding that the defendant came into this country, not with the main and bona fide purpose of being a student, but with the main and fraudulent purpose of being a laborer here, there was no sufficient evidence to sustain the order of deportation of the defendant.

9.

The Court erred in ordering the defendant deported, because the defendant was a student and belonged to the student or teacher (and not laboring) class in China and was as such entitled to come and remain here.

10.

The Court erred in holding that the Treaty with China and laws in force when the defendant came here in 1899 required a Chinese student, coming here for the purpose of learning, to intend to learn the European

sciences, and that it is competent for the administrative officers to make such additional requirement of him by putting it into his certificate, so as to render him liable to deportation if he did not learn such European sciences.

11.

The Court erred in holding that the defendant came here not with the bona fide intent to extend his learning and to learn the English language, but with the main intent to be a laborer.

12.

The Court erred in giving undue importance and weight to the length of defendant's residence here, in connection with the character of defendant's schooling or method of learning, in deciding against the bona fides of his coming as a student

13.

The Court erred in finding and holding that the character of defendant's schooling here was not a compliance with the Treaty and laws, because the Treaty and laws made no requirement or regulation as to the course or kind of teaching to be taken by him, or school to be attended, to acquire such learning.

14.

The Court erred in finding and holding that the character of defendant's schooling here was not a compliance with the Treaty and laws, because the course of learning to be pursued and the time to be used for that purpose are by them left to his own discretion.

15.

The Court erred in finding and holding that the character of defendant's schooling here was not a compliance with the Treaty and laws, because the extent of his

mastery of any of the learnings is by them left to his own discretion and satisfaction.

16.

The Court erred in finding and holding that the character of defendant's schooling here was not a compliance with the Treaty and laws, because even if he had mastered the English language and European sciences, he would not be obliged to return to China or be liable to be deported.

17.

The Court erred in finding and holding that the character of defendant's schooling here was not a compliance with the Treaty and laws, because having come here with such bona fide intent as a student, and having pursued his studies here bona fide for several years, he could afterward abandon his purpose to complete such course of study to the fullest extent and yet have the right to continue to reside here, and he was not obliged before leaving China to map out a complete plan of action for his whole life, part of which plan must have been to return to China when he completed his education and not be permitted for any reason to abandon or depart from that plan while here.

18.

The Court erred in finding and holding that defendant is a laborer, and not a student, because defendant belonged by birth to the student or teacher class, and not to the laboring class in China, and has been at no time while here a laborer.

19.

The Court erred in denying defendant's application for a new trial, because the evidence was insufficient to

sustain the finding that the defendant's main purpose in coming to this country was to be a laborer.

20.

The Court erred in denying the defendant a new trial on the ground that the court had no power to grant an application for a new trial filed after the adjournment of the term

21.

The Court erred in denying the defendant a new trial, because its action in so doing was an abuse of its legal discretion in the premises

Brief of the Argument.

I.

The Complaint is Insufficient in Substance to Sustain the Conviction or Order of Deportation, in that it Does Not Allege Facts Showing Fraud in Defendant's Coming to the United States.

It will be observed that the complaint (Rec. 2), on which the plaintiff in error was ordered deported, states merely that

> "One Leo or Luie Hop, a Chinaman, on this 23rd day of November, 1904, *is unlawfully* within the United States of America, to-wit: *is now* within the district of Nebraska, and living and residing at 319 N. 15th St., Omaha, Nebraska, and *is now* pursuing the occupation of a common laborer, contrary to the laws of the United States of America."

This charge is insufficient in substance and therefore a nullity, because it merely alleges that defendant "*is* unlawfully" in the United States *because* he "*is now*"

residing in Nebraska and "*is now*" pursuing the occupation of a common laborer, which is said to be "contrary to the laws of the United States" and therefore "unlawful." The recitation of facts, showing why his presence here, at the time of making the complaint, was unlawful, limits the meaning of "unlawful" and in effect eliminates it, as a conclusion of law, from the complaint and leaves only the allegations of fact. The charge is in the present tense, and charges only that he "is now" pursuing the occupation of a common laborer and that, even if his coming was lawful, which is not denied, his afterward performing labor was "contrary to the laws;" not that he was or had been before that in fact a common laborer, but that he "is now," for the present and temporarily, "pursuing the occupation" of a common laborer, and that even to do that is "contrary to the laws." It assumes that, even if plaintiff in error came into this country lawfully, in good faith under his certificate, and continued here lawfully as a student until shortly before the complaint was filed, but had then from necessity been compelled to use part or all of his time temporarily as a laborer to support himself as such student, he thereby lost his character of student and became a laborer, and thereby lost his right to be and remain in this country, and was thereafter subject upon complaint to be deported. This is the theory of the prosecution.

But that view of the law and of his rights is incorrect. The *Treaty* with China of Dec. 8, 1894, under which plaintiff in error came into this country, and which was then and is now for this case the Supreme Law of the Land, implies that the test of the plaintiff in error's right to be and remain here is the bona fides and lawfulness of his coming. By Art. I of said Treaty (page 2 herein) it is "the *coming* to this country of *Chinese laborers,*" and not

the remaining here of those Chinese "laborers" already here, that is "prohibited." For Art. II preserved for those Chinese laborers who were then here the right to remain. But Art. III was a proviso for the protection of the right to come here of other classes of Chinese than the cooley or laborer class and provided that Arts. I and II "shall not affect the *right at present enjoyed* of [all of those classes of] Chinese subjects, being officials, teachers, students [there], . . . but not laborers [there], of *coming* to the United States and *residing* therein." This Art. III did not create a new right in those Chinese belonging to the excepted classes, but recognized and protected an *existing right* of such persons to come here to reside. The certificates required by Art. III were not to limit such right, but were to provide evidence to distinguish such comer of the excepted class from the laborer, or other Chinese, then residing here or who might afterwards come. No restrictions were placed on the official, teacher, student or merchant, except that he bring with him the certificate of identification of himself and his class in China. And Congress has not sought to place any restrictions on, or to classify or define, teachers or students, although it has sought to define merchants. That Chinese persons, who belonged to the student or teacher class there, had the original and continuing right to come here to reside, is further evidenced by Art. IV, which, being intended to carry out Art III of the Treaty with China of Nov. 17, 1880, says: "It is hereby understood and agreed that Chinese laborers or *Chinese of any other class,* either *permanently* or temporarily *residing* in the United States, shall have for the protection of their persons and property, all rights," etc.; and Art. III of the Treaty of Nov. 17, 1880, provides: "Chinese subjects, whether proceeding to the United

States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to come and go of their free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation." So, if plaintiff in error was a student in China, and belonged to that or the teacher *class,* he as such has an unrestricted right to come to this country under the classification of student, his coming was bona fide and lawful and he had the right to remain and reside here permanently.

And this view of the law the District Judge also held. For his opinion of April 13, 1905, shows that he considered the character of plaintiff in error's "coming" the essential fact. It states (Rec. 3):

> "I am clearly of the opinion, that . . . *his coming* to the United States . . . . as a student was a mere device to gain entry into this country, and not in good faith to pursue the studies of a student; that his real intention and purpose of coming to the United States was for the purpose of laboring only. I am of opinion that his entry under the certificate mentioned was a fraud upon the United States, and such certificate does not afford him protection."

And only because he found that plaintiff in error had come into the United States in bad faith and fraudulently, and therefore was and is here unlawfully, did the District Judge order him deported. And again, in his opinion of October 27, 1905, (Rec. 5), the District Judge held, that

> "The law evidently meant and intended a student to be one who in coming to this country intended that to be his main object and purpose; and although a

> student may perform manual labor while pursuing his studies for the purpose of supporting himself and not lose his status as a student, yet it should appear that his main purpose was that of being a student."

And this seems to be the opinion of the courts generally. In fact the issuance to plaintiff in error of his student's certificate and his subsequent admission thereunder into this country, by the officers of the government, operated as an *adjudication* of the bona fides and lawfulness of his coming. That decision, unappealed from, is *res judicata* and entitles the defendant to remain here, at least until such determination is overcome by strong competent evidence. And his changing his occupation from student to laborer, or anything else, *after coming here,* would not constitute such overcoming evidence or defeat his right to remain here. His right to remain depends altogether on his "coming," whether that was lawful, whether bona fide or mala fide, whether he was in fact a student and one of the student or teacher class in China, or a laborer there intending to be a laborer here. *United States vs. Sing Lee,* 71 Fed. 680; *Re Chin Ark Ning,* 115 Fed. 412; *Re Yew Fing Hi,* 128 Fed. 319; *Louie Gwen vs. United States,* 128 Fed. 522; *United States vs. Leo Won Fong,* 132 Fed. 190, 195; *United States vs. Joe Dick,* 134 Fed. 988, 989; *United States vs. Seid Bow,* 139 Fed. 56; *Tom Hong vs. United States,* 193 U. S. 517, 24 Sup. Ct. 517. And his coming and entry under such certificate therefore protects him here, unless the procuring of the certificate and entry under it are affirmatively and clearly proven to be a palpable *fraud,* such as would avoid any judgment. And the Government treats the acts of its administrative officers, in admitting or refusing to admit Chinese, as having the binding quality of judgments which can not be avoided by the courts,

by habeas corpus or otherwise, except for fraud, *United States vs. Sing Tuck,* 194 U. S. 161, 24 Sup. Ct. 621; *United States vs. Ju Toy,* 198 U. S. 253, 25 Sup. Ct. 644; the same as it has always treated decisions of the officials of the Land Department as binding and conclusive, except in cases of fraud, *Andrews vs. Eastern Oregon Land Co.,* 203 U. S. 127, 27 Sup. Ct. 42.

It seems clear therefore that the right of a Chinese subject, (coming to the United States as a student or one of the student or teacher class, upon a certificate as such, and being admitted,) to be and remain in the United States, depends wholly upon his *class* there, or possibly also upon the *purpose* and *intention* of his *coming;* that his being and remaining here is lawful if his coming was lawful; and that his coming was lawful if he belonged in China to the student or teacher class, or came here bona fide and with the primary object of being a student. The essential fact and test therefore is whether he belonged to one of the excepted classes in China and had a strict legal right to come to this country, or if not, whether he came here bona fide to be a student, and, as said before, there is a presumption, arising from his certificate and entry under it, (rebuttable only by the clearest positive competent evidence,) that he was such student in China and came here bona fide and of right as such.

The necessary averment, then, to be made by the prosecution and issue to be tried, in a deportation case, is that defendant did not belong to one of the excepted classes in China, but nevertheless mala fide claimed that he did, and fraudulently procured a certificate as a student and fraudulently procured his admission into this country. And while evidence of how a Chinaman has conducted himself, and what he has done, since coming to this country, may be competent evidence for or against

him, yet it is not to be received to show merely that the defendant was at the date of filing the complaint pursuing the occupation of a laborer and was not then a student, (which is immaterial), but is to be received only to prove or disprove his character of being of the student or teacher class in China or that the intent with which he came, i. e., his coming here, was bona fide as a student and therefore lawful. His right to be and remain here depends altogether and only on the lawfulness of his coming, and if his coming was of right or bona fide and lawful, then, as we have seen, nothing he subsequently does can change the character of his coming or destroy his right to be and remain here.

The complaint then, to be sufficient, should have charged that he came into this country not of right or bona fide as a student, but that he was a laborer in China, or, if not one of the laboring class there, that he desired to be a laborer here, and that he came here mala fide and with the sole and primary or fraudulent intent of being a laborer when and while here, and that he had been in pursuance of such purpose a laborer ever since coming into this country, in circumvention of the laws and in fraud of the United States.

It may be contended that *Fong Yue Ting vs. United States*, 149 U. S. 697, and *Chin Bak Kan vs. United States*, 186 U. S. 193, are contrary to this view. But we believe not. Prior to the act of March 3, 1901, no complaint seems to have been necessary to deport a Chinaman. But by section 3 of that act it was provided that *thereafter* "no warrant of arrest for violation of the Chinese exclusion laws shall be issued by the United States commissioners *excepting* upon the *sworn complaint* of a United States district attorney," etc. The *Fong Yue Ting Case* was decided long prior thereto, and the *Chin*

Bak Kan decision, though the case was begun March 13, 1901, seems merely to have followed the *Fong Yue Ting Case* without consideration of the fact that prior to the act of March 3, 1901, the laws had not provided for and required a formal and "sworn complaint." The failure of the Court to give full effect to these words of the statute in the *Chin Bak Kan Case* may also have been due to the fact that in both cases the Court held that it was competent for Congress to place on the defendant the burden of proof and to give the complaint a prima facie effect which would require defendant's deportation unless overcome by affirmative proof. A statute may make the complaint, the Court holds, operate as a prima facie case, as on default, and so cast the burden of proof on the defendant. But that does not do away with the necessity for the "complaint," for, to the contrary, the statute specifically requires it. The meaning of the statute, it seems to us, is that there must be a sworn complaint, full, precise and sufficient in its statement of facts to advise the defendant of the true and exact charge against him, so that he may know what to meet and may prepare himself to meet it. The statute has not limited the meaning of "complaint," and it must therefore be given its ordinary meaning of a complete and sufficient statement of the facts or charge; and that the complaint must be "sworn" emphasizes this meaning. The statute is in the nature of a limitation on the power of the Government, and of a grant of right or guaranty of protection to Chinamen, in furtherance of the purpose of the Treaty. But was it intended by the Treaty and the act to cast the burden of proof on a student, who was admitted under his certificate, to disprove that he was a laborer and to disprove the mala fides of his coming? Was it intended that the certificate

and endorsements showing admission thereunder should not be sufficient to overcome the prima facie case made by the complaint (if a sufficient complaint creates such prima facie case), and compel the prosecution to go forward to prove and sustain the complaint? It would seem not. If the giving him by the proper Officers in China the certificate provided for in the Treaty and his production of it at the entry port and his admission under it by the Government Officials here constitutes an adjudication of the rightfulness of his coming, as it certainly does under the decisions of this court, then that adjudication, unappealed from, like every other, can not be attacked except for fraud, and the fraud would have to be alleged in the complaint and proved by the prosecution; for the production at the trial of his certificate and proof of his entry under it would be a complete justification of the defendant's presence here, unless the prosecution would go forward and prove fraud in the certificate and in his coming and entry. See cases cited at pages 19-20. There is a difference between refusing an alien admission into this country, and seeking to deport one after he has been regularly admitted and is lawfully residing here. The one is met at the threshhold and refused a landing, as was the fact in both *United States vs. Sing Tuck* and *United States vs. Ju Toy, supra;* while the other, having been duly admitted, in practical effect is being banished, and of this class is the case at bar. Where it is sought to deport or banish an alien duly permitted to enter this country, especially where he has been permitted to reside here a number of years without any question of his right to be here, the burden of proof ought not to be, and we think is not, on the person sought to be deported, but rather, as in other cases, on the Government. *Moy Suey vs. United States*, 147 Fed.

697. Also, the *Chin Bak Kan Case* appears to be unlike our case in its facts, in that the defendant did not enter under a certificate, but entered surreptitiously on or about the day the complaint was filed, and his coming and entry, unlike plaintiff in error's coming and entry, were not by the aid and permission of the Government's official agents, both in China and here, and therefore could not be an adjudication of his right to enter and remain here. Besides, it is not clear what the Court's view was with reference to the complaint in the last named case. Certainly it does not appear that the point made here existed or was made there.

The complaint on which plaintiff in error has been ordered deported has no such element or issue of fraud in it, and such issue, as shown by his opinions, the District Judge considered essential. For he expressly based his order of deportation on the finding of December 30th that plaintiff in error came here as, and to be, a laborer and his coming was a fraud on the United States, and for that reason his student's certificate would not protect him. The District Judge considered that he could not order his deportation except upon the finding that his coming here was mala fide and a fraud then and there upon the United States, and but for that finding would not have ordered his deportation.

But therein is where the error and injury to plaintiff in error lies. No charge is made in the complaint that plaintiff in error did not come here rightfully and bona fide to be a student; but, as we said before, the prosecution's theory and claim are merely and it charges only that, though his coming here was lawful, though he was one of the student or teacher class in China or came here bona fide to be a student, and was lawfully admitted, yet

that he has since then, after several years time, weakened in his purpose and ability to devote all of his time and effort to studying and "*is now* pursuing (more or less) the occupation of a common laborer," and that it is contrary to law for him to do any labor at all, even for his own support, while pursuing his education, and that for him to labor at all at any time requires his immediate removal to China. The only issue, then, before the commissioner and the District Court was whether plaintiff in error was, at the time the complaint was filed, "pursuing the occupation" of a laborer and was actually doing any work and therefore was not entitled to be and remain here. And that was the only issue that plaintiff in error had to or did meet; and that issue he met by the production of his certificate and endorsements thereon. But while that was the only issue tried, and an immaterial one, nevertheless the District Judge, when he came to decide the case, made a finding upon a wholly different and material issue, that of fraud in defendant's coming, and on such finding ordered plaintiff in error deported. Plaintiff in error, therefore, was found guilty of a charge not made against him or tried.

The right of plaintiff in error not to be deported except after trial on a sufficient complaint can not be controverted. For this prosecution is like a criminal prosecution and plaintiff in error should not be deported unless charged with and convicted of a real legal offense, and he clearly was not so charged in this case. Even habeas corpus lies where the complaint is insufficient to charge a legal offense, or where, if sufficient, the verdict or finding does not cover some essential fact or issue. *Ex parte Simmons*, 107 N. W., Neb., 862.

We think this Court should reverse the judgment of deportation and direct that the complaint be dismissed for its insufficiency and plaintiff in error discharged.

II.

There Was Not Sufficient Evidence Before the District Court to Warrant or Support the Finding that Plaintiff in Error Was Not One of the Student or Teacher Class in China, Or that he Came Into the United States Mala Fide and Fraudulently, Or to Sustain the Order of Deportation.

The bill of exceptions recites: That (Rec. 12) on April 13, 1905, "the above entitled cause was called for trial, tried and submitted to the Court or Judge, but without taking any evidence, and merely upon the complaint, the transcript of his proceedings made by the United States commissioner from whose order the case was appealed, and the additional separate findings made by said commissioner, and the original student's certificate and translation thereof, with all endorsements and certificates thereon, under which defendant was admitted into and entered the United States;" that (Rec. 15) "the evidence taken before the commissioner was not reduced to writing or preserved, or in any manner presented to the District Court. And no other or further evidence than above recited was offered by either party" on the trial before the District Court; that thereafter the District Court decided the case and ordered the defendant deported, to all of which the defendant excepted; and that (Rec. 32) no other evidence was received or considered by the District Court.

The complaint, the commissioner's transcript of his record, the additional and separate findings signed by him on December 30th, and said student certificate with

its endorsements, were then all that was before the District Court. Let us see what these were.

The *complaint* we have already considered and have found that, construed most strongly against the prosecution and favorably to the defendant, as it should be, it was and is a nullity. The Court nevertheless either gave its insufficiency little thought or considered it most strongly against the defendant. But in any event the complaint would not be evidence, or any proof, of the averments made in it; it could not prove itself, certainly not in the face of the fact that defendant was entered by Government Officials under a certificate proper in form.

The *transcript of the commissioner's docket* is the best and only evidence of the facts occurring while the case was before him, and of what he thought and did, for his docket was his official record. The transcript of his docket recites (Rec. 12-14): That the complaint was filed with the commissioner November 23, 1904, and the same day the marshal arrested the defendant and took him before the commissioner, and the defandant, after the complaint was read and explained to him "thereupon for plea said he is not guilty as charged in the said complaint." The case was set for hearing on December 29, 1904, and Alfred Kennedy, Thomas Britton, Glenn Campbell and Frank Hahne were subpoenaed as witnesses for the plaintiff. The commissioner's docket then reads:

> "On December 29, 1904, pursuant to the continuance of December 20-28, 1904, defendant present, [case] came on for hearing, Alfred Kennedy, Thomas Britton, Glenn Campbell and Frank Hahne are sworn and examined as witnesses for the United States and Anna M. Sykes and defendant are sworn and examined for deft.
>
> "*And from the evidence of the said witnesses, it appearing to me, the commissioner, that the laws of*

> *the United States have been violated as charged in the complaint, and that there is good cause herein to believe the defendant guilty of the alleged offense,* it was ordered that deft., Leo Hop be deported from the United States to the Empire of China, his native country, said deportation to be from the port of San Francisco, [and] that defendant be committed to the custody of United States marshal to carry this order into effect. From said order defendant appeals to the district court and enters into a bond in the sum of $500 for his appearance to said court January 10, 1905, at 10 o'clock a. m."

But this transcript, it will be noted, had and could have no weight as evidence to support the findings made by the District Judge, for it did not pretend to find and adjudge more than that on Nov. 23, 1904, defendant was a Chinaman unlawfully here because he was *on that date* (not prior thereto) pursuing the occupation of a common laborer, which present performance of labor was averred to be contrary to the laws of the United States, no matter how rightful his coming and entry were. The transcript does not find that plaintiff in error's coming and entry were not lawful, and is therefore no evidence against him.

There is no support in the evidence then, for the Judge's findings against defendant, unless it be in the *commissioner's additional and separate findings* of December 30th. And a comparison of the Court's opinion of April 13th with these separate findings of the commissioner shows that the Court's opinion finds its whole support in these additional and separate findings of the commissioner. For in these findings of December 30th it is stated that the defendant was a Chinese manual laborer and came here to labor, that he was at no time while here a student within the meaning of the law, and that his coming here as a student was a mere device to

evade the law and a fraud on the United States, as stated in the Court's opinions.

But was that additional finding of the commissioner of December 30th competent or any evidence? We think not. The commissioner heard the evidence, and rendered his decision, and wrote up his findings and judgment in his docket, all on December 29th. His findings and judgment were complete; that was his official record; and when he had made that record he had exhausted his power. It is presumed to be a record of all he did. Any attempted official action not shown by or referred to in his record and transcript of it, but evidenced only by some separate paper, even though signed by him, would be void and not constitute legal evidence, for a commissioner speaks only by his docket or official record; and neither his transcript nor certificate thereto shows that any attempt was made to amend his docket or record by adding additional findings or substituting new and other findings and judgment. Now these additional findings, it will be observed, are dated December 30th, one day after the commissioner had rendered judgment, written up his docket and exhausted his power. The commissioner had on the 29th fixed the amount of defendant's bond for appeal and the defendant had on the 29th given bond and taken an appeal. The commissioner's jurisdiction was then exhausted and he could not on the next day, the 30th, make findings of any nature; certainly not and make no record of them. These findings bear no endorsement by the commissioner of being filed with him, and, as we stated, there is no reference to them in his docket. Nor are they certified by him. And besides they bear evidence that the defendant objected and excepted to their making. They therefore have no validity or sanctity in law, are mere

waste paper, and have no competency as evidence whatever. And the District Judge was not justified in giving them any weight or consideration.

There was, however, evidence before the Court in plaintiff in error's favor, evidence which created a presumption of the rightfulness of plaintiff in error's presence here at all times, which presumption was just as conclusive as an adjudication, unless it was overthrown by positive, direct and competent evidence of fraud to the contrary. And this conclusive evidence in plaintiff in error's favor was *the certificate,* with all its endorsements, under which he was admitted into the United States. There was, as we have just seen, no competent evidence to overthrow it or even in contradiction thereof, the findings of Dec. 30th being merely gratuitous, without authority or sanction in law; and the rightfulness or lawfulness of plaintiff in error's coming, entry and continued residence here is therefore undisputed in the evidence. *United States vs. Sing Tuck,* 194 U. S. 161, 24 Sup. Ct. 621; *United States vs. Ju Toy,* 198 U. S. 253, 25 Sup. Ct. 644; *Andrews vs. Eastern Oregon Land Co.,* 203 U. S. 127, 27 Sup. Ct. 42. And the burden of proof was on the Government. *Moy Suey v. United States,* 147 Fed. 697.

The findings and judgment of the District Court are, therefore, without competent or any evidence to support them.

III.

The Supreme Court Will in This Case Review the Evidence and Find for Itself the Facts, Particularly in View of the Fact that the District Judge and Commissioner Misconstrued the Treaty and Laws and their Findings of Fact were Made What They Are Only Because of Their Misconceived Idea of the True Intent and Meaning of said Treaty and Laws.

It may be contended that this Court, because the case has already been heard twice,—before the commissioner and the District Court,—can not review or consider the evidence to determine what the true facts are. But we think, in view of the manner in which the case was tried below, and the character and meagerness of the evidence submitted, and the apparent misconception by the commissioner and District Judge of the meaning of the Treaty and laws, which undoubtedly was the cause of their making their adverse findings of fact against plaintiff in error, that it is the duty of this Court to decide for itself the true facts. And whether the real facts in the case will warrant or permit plaintiff in error's deportation is a mixed question of law and fact; for the facts are as they appear in the light of the Treaty and the law, and cannot be rightly determined except in the light and within the true meaning and spirit of the Treaty and the law. *Tom Hong vs. United States,* 193 U. S. 517, 24 Sup. Ct. 517.

In the *Tom Hong Case* the Supreme Court reversed the judgment of the District Court because of a mistaken and too narrow construction of the act defining "mer-

chant'' and consequent erroneous finding of fact. There it was said ''no new evidence seems to have been admitted in the District Court;'' and it was held that, because of the wrong construction of ''merchant,'' the District Court was led into an erroneous finding of fact that defendant was not a merchant within the meaning of the law; and the Supreme Court, properly construing the law, and realizing that an injustice had been done to the defendant because of the erroneous finding of fact based on the erroneous construction of the law, felt in duty bound to and did make a finding of fact for itself from the evidence, in the light of the correct construction of the law, and reversed the judgment and ordered the appellant discharged.

So in the case at bar, the evidence taken before the commissioner was not preserved, and yet no new evidence was taken before the District Court and the District Judge had before him only the complaint, the commissioner's transcript of his docket, his additional findings of Dec. 30th, and the certificate and endorsements thereon under which plaintiff in error was permitted to enter; and it clearly appears that the Court's finding that plaintiff in error was at all times a laborer and never a student, and did not belong to the teacher or student class in China, and that he therefore came into this country mala fide and fraudulently, is based on and would not have been made except for an erroneous construction of the Treaty and laws as to what a student was or is, and what a Chinaman needed to do to be a student here, and as to what the rights were and are of a Chinaman in this country who belonged to the student or teacher class in China. The certificate, as we have seen, is conclusive of plaintiff in error's status and right to be and remain here; but we have also the affidavits, made since the trial, which

corroborate the certificate. From these affidavits it appears conclusively that plaintiff in error belonged in China to the student or teacher class, his father being a life-long teacher, and he being a student, and neither of them ever a laborer. And as such he had an unrestricted right to come here to remain, he being only required by the treaty to bring with him an identifying certificate to facilitate his entry by proving that he was not a laborer, and by which he might be identified at any time after coming if the rightfulness of his coming was questioned. In other words, his certificate was to be the means of proving his identity and character, as not being a laborer by birth or class in China, and of distinguishing him from any Chinese laborer who might have come or might come here unlawfully, if it should be claimed after his coming (as all Chinamen look alike to us) that he was a laborer who had been smuggled or otherwise came unlawfully into the United States.

Being then one of the student or teacher class in China having the right to come and remain here, was he, after coming here, bound hand and foot and gagged by that same Treaty, or was he allowed some liberty of thought and action? The prosecution and the Court thought that he was so bound and gagged. We think not. The District Judge gave little or no consideration to the fact that plaintiff in error was a student and belonged to the student or teacher class in China, as shown by his certificate at the trial and later by the affidavits, and therefore, had no right, under the Treaty, to come here to reside permanently. His idea was, as his opinions show, that to be a student here within the meaning of the Treaty and law was to attend our public schools or colleges, and that attendance at a private school was not and could not be a compliance with the Treaty and law.

It was for this reason that he held that plaintiff in error had not been a student at all and so must be deported. The Judge's opinion of April 13th reads:

> "The only study that he has pursued in this country is the simple rudiments of the English language taught by his Sunday School teacher. This does not make him a student of the English language and European sciences within the meaning of the act of Congress, and I am clearly of the opinion that the facts, *as found by the commissioner,* indicate that his coming to the United States to study the English language and European sciences as a student was a mere device to gain entry into this country."

And in his opinion of October 27th he also says:

> "I have, however, examined the evidence [the foregoing affidavits], and it is convincing that he was not a student within the meaning of the law."

But we think this takes too narow a view of the Treaty and law, when properly construed, and of plaintiff in error's right as one who was a student and belonged to the student or teacher class in China, who had an absolute right to come and reside here permanently, or who came here bona fide to be a student, and was regularly admitted, and that the Judge's findings and judgment are not justified.

And in the light of the true meaning of the Treaty and laws, as this Court will determine it, the Court should also find what are the true facts.

We contend, as we stated in our application for a new trial as to both the law and facts, and in our assignment of errors, that the true meaning of the Treaty and laws in force at the time defendant came here was and is that he, being a student in China and one of the student or teacher class there, and not a laborer there, had a perfect right to come here and was entitled to a student's cer-

tificate to bring with him to facilitate his entry and to protect him in his right to be and remain here; that it was not necessary for him to intend to learn the European sciences, for the Treaty and laws did not require it of him, nor give the administrative officers of the Government the right to make such requirement of him by putting it in his certificate; that, if he must actually continue to be a student after coming here, his attendance at private school in good faith was a compliance with that requirement, because neither the Treaty nor the laws specified what kind of schools he should attend nor provided that anyone give him instruction or direction in that regard, but, on the contrary, left it wholly to his judgment and discretion as to what kind of school he would attend, whether private or public, and it can not be said that he acted unwisely or unfairly in attending private school, for private schools were all the schools they had in China and he was not advised that public schools might be or were better; that the extent of his schooling here and mastery of any of the learnings was left to his own discretion and satisfaction, as the Treaty and laws specified no standard or amount of knowledge to be acquired; that it was not esential for plaintiff in error before leaving China to map out a complete plan of action for his whole life, part of which plan would be to return to China when he completed his education and not be permitted for any reason to abandon or depart from that plan while here on penalty of being forcibly deported to China; but that a student in China or one of the student or teacher class there had a right to come here and pursue his learning at his own convenience and choice and might do sufficient labor to support him at it or even afterward abandon his schooling altogether and take up business or other pursuits.

And this view of the Treaty and laws is, we think, the only reasonable one. As we said before, Congress never attempted to define "student," or to limit their rights or to compel their return to China on certain conditions. They were left the greatest freedom, as belonging to a class distinct from laborers, and the courts should not set limits on that freedom, for the Government undoubtedly intended they should have unrestrained liberty of action. Congress indeed has attempted to define and limit the meaning of "merchant" as it appears in the Treaty, and has defined it to mean one who is engaged in mercantile business at a fixed place, "which business is conducted in his name." Some of the lower courts were disposed to construe this language literally, but the Supreme Court in *Tom Hong vs. United States*, 193 U. S. 517, 24 Sup. Ct. 517, said:

> "But this would be too narrow a construction of the statute. The purpose of the law is to prevent those who have no real interest in the business from making fraudulent claims to the benefits of the act as merchants. . . . The main purpose is to require the person to be a *bona fide* merchant, having, in his own name and right, an interest in a real mercantile business, in which he does only the manual labor necessary to the conduct thereof."

In that case the Supreme Court found from the evidence, contrary to the finding of the lower court, that the defendant had originally been a bona fide merchant, within the meaning of the Treaty and law as thus interpreted, though not doing business in his own name, and held that he was protected and entitled to remain here notwithstanding he had since become a laborer. See also *United States vs. Seid Bow*, 139 Fed. 56. And the burden of proof is on the Government, not on the defendant, in a deportation case. *Moy Suey vs. United States*, 147 Fed. 697.

And so we contend, that the meaning of the Treaty and law as to a student or one of the student or teacher class coming here under a student's certificate, was that the rightfulness of his coming depended on the bona fides and truthfulness of those facts; and that it is the duty of this Court, in this case, to determine for itself, in the light of the true meaning of the Treaty and law, whether plaintiff in error was a student and one of the student or teacher class in China and whether he came here bona fide and lawfully as a student, and whether he has been a student since coming here within the true meaning of the Treaty and law. And this Court, as the District Court should have done, will refuse to consider said purported findings of December 30th, but will give said certificate and its endorsements, under which plaintiff in error was entered, full weight as a conclusive and undisputed adjudication of the rightfulness and lawfulness of plaintiff in error's coming and entry and consequent right of continued, unrestricted residence here.

IV.

The District Court Seemed Further of the Opinion that it Could Not Vacate the Order of April 13, 1905, Because the November Term at Which it was Entered Adjourned Sine Die April 22nd, and our Application was Not Filed Until May 8th; and This we think Was an Abuse of its Legal Discretion in the Premises.

But this conclusion of the Judge ignores the facts, that the complaint was insufficient in law to sustain the conviction or judgment of deportation; that he himself took no evidence on the trial before him, but heard the

case only on the complaint, the transcript of the commissioner's record, his additional findings of December 30th, which in law was no legal evidence at all, and on the certificate and its endorsements under which plaintiff in error was landed, and therefore decided the case on no or no sufficient evidence; and that under the circumstances plaintiff in error was in reality being convicted or ordered deported without a complaint, hearing or any evidence against him.

If the complaint was sufficient, or there was introduced sufficient evidence to sustain a good complaint for deportation, there might be merit in the Judge's conclusion. But there being both an insufficiency of the complaint and no evidence at all against plaintiff in error before the court, the judgment of deportation is absolutely void, and is subject to be so declared in habeas corpus or certiorari proceedings. *Ex parte Simmons,* 107 N. W., Neb., 863; *Davis vs. Preston, District Judge,* 129 Iowa 670, 106 N. W. 151. And this court should now so treat it.

But whether this is true or not, the appeal to this Court from the judgment of April 13, 1905, was taken within two years from that date, and plaintiff in error is entitled to have the judgment reviewed without regard to whether there was error in refusing the application for a new trial.

We therefore think that this Court should reverse the judgment, or declare it void and direct that the complaint be dismissed for its insufficiency and plaintiff in error discharged.

Respectfully submitted,

JOHN L. WEBSTER,
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ROBERT H. OLMSTED,
Attorneys for Plaintiff in Error.

Omaha, January 20, 1908.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

LIU HOP FONG, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 181.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on writ of error to the United States District Court for the District of Nebraska. The plaintiff in error, Liu Hop Fong, was arrested upon a warrant issued by United States Commissioner Anderson on a complaint sworn to before him by the United States attorney for the District of Nebraska, charging that said Liu Hop Fong was a Chinese laborer, who was in the country in violation of law. (R., 2.)

The record sets forth the complaint of the district attorney and a transcript of the proceedings

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before the commissioner who heard the case. This transcript shows that the defendant was brought before the commissioner on November 23, 1904, and the hearing was continued, at his request, from November 23 until December 20, 28, and 29, 1904.

On the last-mentioned day the case came on for hearing and the testimony of four witnesses was taken on behalf of the Government and of the defendant and one other witness on his behalf. The Chinaman defended on the ground that he had entered the country in pursuance of a certificate issued in accordance with the treaty and statutes, showing him to be a student and, therefore, a member of one of the excepted classes, and that he had come here for the purpose of studying English and the European sciences. None of the testimony appears to have been preserved or presented to the District Court (R., p. 15–d), but the commissioner made certain findings, which were to the following effect:

> And, from the evidence of the said witnesses, it appearing to me, the Commissioner, that the laws of the United States have been violated, as charged in the complaint, and that there is good cause shown to believe the defendant guilty of the alleged offense, it was ordered that defendant, Leo Hop, be deported from the United States to the Empire of China, his native country. (R., p. 14.)

On the day after the hearing the Commissioner made certain "additional and separate findings," the material portion of which reads as follows:

> I further find that during the time of his residence in said city he has at all times been a common laborer and has at no time pursued the study of the English language beyond the merest rudiments taught by his Sunday school teacher, and has at no time pursued the study of European sciences or any other study except as to the rudiments of the English language; and that the said Liu Hop Fong has at no time been a student within the meaning of the act of Congress approved May 5, 1892, and acts of Congress amendatory thereof, and that he is now unlawfully within the United States of America. (R., p. 15.)

The defendant took an appeal to the United States District Court, which, on April 13, 1905, affirmed the order of the Commissioner, the presiding judge filing a memorandum opinion, in which he said, *inter alia:*

> The only study that he has pursued in this country is the simple rudiments of the English language taught by his Sunday-school teacher. This does not make him a student of the English language and European sciences within the meaning of the act of Congress, and I am clearly of the opinion that the facts as found by the commissioner indicate that his coming to the

> United States to study the English language and European sciences as a student *was a mere device to gain entry into this country and not in good faith to pursue the studies of a student;* that his real intent and purpose in coming to the United States was for the purpose of laboring only. (R., p. 3.)

On April 22, 1905, the November, 1904, term of the court was adjourned, *sine die;* on May 8, 1905, a "petition for a new trial, both as to law and facts," was filed (R., 16), and on August 28 of the same year a motion for rehearing was submitted. On October 27 this application was heard and denied, Judge Munger filing a memorandum opinion, which reads as follows:

> This is an application for a rehearing. The original judgment was rendered at the November term, 1904. The application for rehearing was not made until after the term expired. The judgment became final with the termination of the term at which it was rendered.
>
> I have, however, examined the evidence and it is convincing that he was not a student within the meaning of the law. The law evidently meant and intended a student to be one who in coming to this country intended that to be his main object and purpose; and, although a student may perform manual labor while pursuing his studies for the purpose of maintaining and supporting himself and not lose his status

> as a student, yet it should appear that his main purpose was that of being a student.
>
> In this case, I think his main purpose and object was that of a laborer, and the studying which he did was a mere incident. The motion for a rehearing is denied and the order of deportation stands.

To review this judgment a writ of error was sued out from this court.

THE LAW.

The law applicable to the case at bar will be found in the treaty between the United States of America and the Empire of China, negotiated March 17, 1894 (28 Stat., 1210), and in the Acts of September 13, 1888 (25 Stat., 476), and of May 5, 1892 (27 Stat., 25).

Articles I and III of the Treaty read as follows:

> I. The high contracting parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.
>
> III. The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein.

To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Governnent or the Government where they last resided viséed by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

Section 13 of the act of 1888 provides:

That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came.

Section 3 of the act of 1892 reads as follows:

That any Chinese person or person of Chinese descent arrested under the provi-

sions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.

ARGUMENT.

The assignments of error, twenty-one in number, raise but two questions for the consideration of this court, which will be discussed in order.

I.

THE PROCEDURE FOLLOWED WAS REGULAR AND SATISFIED THE REQUIREMENTS OF THE LAW.

(*a*) ON BEHALF OF PLAINTIFF IN ERROR IT IS URGED THAT THE COMPLAINT IS INSUFFICIENT IN SUBSTANCE TO SUSTAIN THE ORDER OF DEPORTATION.

The record shows that the district attorney appeared before the United States commissioner and swore to a complaint charging that the defendant Leo Hop was a Chinese laborer unlawfully in the United States (R., 2). That this complaint had the effect of bringing the defendant before the commissioner and raising the issue of his right to be in the United States can hardly be denied. The contention of counsel for the plaintiff in error seems to be that the complaint should be tested by the technical rules of pleading in criminal cases. This question is no longer an open one in this

court. In *Fong Fue Ting* v. *United States* (149 U. S., 698, 728), the court said:

> When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant, and a judge—*actor, reus, et judex.* (3 Bl. Com., 25); *Osborn* v. *Bank of United States* (9 Wheat., 738, 819). *No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute.*

The rule thus laid down was approved in *Chin Bak Kan* v. *United States* (186 U. S., 193, 199) and in *Ah How* v. *United States* (193 U. S., 65, 77), where Mr. Justice Holmes, speaking for the court, said:

> The complaints are objected to as insufficient, because in addition to alleging that the appellants are laborers not entitled to remain in the United States without certificates, it adds the words "having come unlawfully into the United States without certificates," thus implying, it is said, that an unlawful coming into the United States could be legalized by obtaining a certificate. It is enough to say that such objections have been answered by *Fong Yue Ting* v.

> *United States* (149 U. S., 698, 729), and *Chin Bak Kan* v. *United States* (186 U. S., 193, 199). In the former it was laid down that "no formal complaint or pleadings are are required." *That proposition is not affected by the later statutes.*

(*b*) THE THIRD ASSIGNMENT OF ERROR CHARGES THAT—

> THE TRIAL BEFORE THE DISTRICT COURT BEING *de novo*, AND THE EVIDENCE TAKEN BEFORE THE COMMISSIONER NOT BEING PRESERVED, THE COURT ERRED IN HEARING AND DECIDING THE CASE AGAINST THE DEFENDANT UPON THE FINDINGS OF THE COMMISSIONER ALONE, WITHOUT THE TAKING OF NEW AND ADDITIONAL EVIDENCE.

This objection to the procedure pursued by the district court in hearing the case on appeal comes too late, for the record (p. 15d) distinctly shows that neither side sought the introduction of additional evidence. The averment in the record on this point is as follows:

> The evidence taken before the Commissioner was not reduced to writing or preserved, or in any manner presented to the district court. *And no other or further evidence than above recited was offered by either party.* Upon consideration whereof, *after argument by counsel for both parties*, the court or judge on the same day filed an opinion and ordered the defendant deported, to all of which the defendant excepted.

This shows clearly that counsel for the Chinaman made no offer of additional evidence at the hearing before the District Court, but that he did orally argue the points involved. In view of this it is difficult to see how the judge could have done otherwise than act upon the findings of the Commissioner.

Manifestly, the presumption was that the findings of the Commissioner were warranted by the evidence submitted to him, and if the plaintiff in error wished to have that finding reversed it was incumbent on him to show affirmatively that the evidence was insufficient to justify the order of deportation. This he has not done.

"He has made no objection to the finding of facts before the Commissioner and thus has impliedly assented to a hearing before the judge on an agreed statement of facts." In re Chin Ark Wing, 115 Fed., 412, 413.

But, aside from this, it is doubtful whether the action of a court in determining a Chinese case on appeal, solely upon the findings of the Commissioner, and its refusal to grant a trial *de novo*, would afford ground for a review of that action. It is true that in some instances courts have granted trials *de novo*, but this practice is by no means required by statute.

In the *Fong Yue Ting* case, supra, at pp. 713 and 714, Justice Gray said:

> The power to exclude aliens and the power to expel them rest upon one founda-

> tion, are derived from one source, are sup ported by the same reasons, and are in truth but parts of one and the same power.
>
> The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend.

In the case of *Chin Yow* v. *United States* (208 U. S., 8), decided at this term of the court, it was held that the statutes merely require a fair, though summary, hearing. While that case related to an exclusion proceeding, the policy of the law seems to be the same in regard to a deportation proceeding and, as was stated by the Chief Justice in the Chin Bak Kan case, supra, at page 201:

> Except in cases under that section where the question of jurisdiction alone is certified we have power to dispose of the entire case, but as the jurisdiction of the Commissioner is sustained we are of opinion that we can not properly reexamine the facts already determined by two judgments below. That is the general rule, and there is nothing to take this case out of its operation, and, on the contrary, the conclusion is, *a fortiori*, justified. The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the

> legislation in respect to exclusion and expulsion is opposed to numerous appeals. And we are not disposed to hold that where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country, he is therefore entitled to demand repeated rehearings on the facts.

In the case at bar it is very clear that the plaintiff in error had ample opportunity to present any evidence he might have had bearing on his right to remain in the United States. As has been stated, the record shows that the hearing was adjourned for a month, at his request, and it is not alleged that the commissioner in any way abused the discretion vested in him. Appeal was taken to the District Court, which affirmed the finding of the commissioner. On an application for rehearing, although filed after the court had adjourned for the term, the district judge again reviewed the merits of the case, taking under consideration a number of affidavits filed on behalf of the plaintiff in error, and for a second time expressed the opinion that the Chinaman was not entitled to remain in the United States.

The court was also justified in affirming the decision solely upon the commissioner's report of the evidence. In the Ah How case, supra, at page 78, this court said:

> We have assumed, for the purpose of decision, what does not appear from the record, that the judge who tried the case on appeal

tried it solely on the Commissioner's report of evidence and heard no witnesses.

The procedure to be followed would, under the statute, seem to be a matter entirely within the sound discretion of the court.

II.

THE DEFENDANT IS NOT A STUDENT WITHIN THE MEANING OF THE TREATY, AND THE CHINESE EXCLUSION LAWS ENACTED IN CONFORMITY THEREWITH.

The ninth and fourteenth assignments of error read as follows:

> 9. The court erred in ordering the defendant deported, because the defendant was a student and belonged to the student or teacher class (and not laboring class) in China and was as such entitled to come and remain here.
>
> 14. The court erred in finding and holding that the character of defendant's schooling here was not a compliance with the treaty and laws, because the course of learning to be pursued and the time to be used for that purpose are by them left to his own discretion.

The treaty with China of 1894 (28 Stat., 1210, 1211), expressly designates the classes of Chinese persons who shall be permitted to enter the United States and reside therein. Obviously those Chinese persons not included in any of these classes are to be regarded as *not* entitled to admis-

sion, or, having through any means obtained admission, to thereafter reside in the United States. This is very aptly phrased in the case of *Lee Ah Yin* v. *United States* (116 Fed., 614, 616), the Circuit Court of Appeals for the Ninth Circuit saying:

> * * * the words "Chinese laborers" as used in the treaty were intended to designate all immigration to the United States from China other than that of the privileged classes, who were by the terms of the treaty permitted to come * * *.

Article III of the treaty provides:

> The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

Congress, in section 6 of the act of May 6, 1882, as amended by the act of July 5, 1884 (23 Stat., 115), has declared the effect to be given the certificates mentioned in the treaty:

* * * * *

> Such certificate viséed as aforesaid shall be *prima facie* evidence of the facts set forth

> therein, and shall be produced to the Chinese inspector in charge of the port in the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person producing the same to establish a right of entry into the United States; *but said certificate may be controverted and the facts therein stated disproved by the United States authorities.*

Counsel for plaintiff in error urges that in spite of the clear and unambiguous language of the statute the certificate under which the Chinaman entered the country is made the sole test of his right to remain here. He uses this language (p. 19 of his brief):

> In fact the issuance to plaintiff in error of his student's certificate, and his subsequent admission thereunder into this country, by the officers of the government, operated as an adjudication of the bona fides and lawfulness of his coming. That decision, unappealed from, is *res adjudicata* and entitles the defendant to remain here, at least until such determination is overcome by strong competent evidence. And his changing his occupation from student to laborer, or anything else, after coming here, would not constitute such overcoming evidence or defeat his right to remain here. His right to remain depends altogether on his

> "coming," whether that was lawful, whether bona fide or mala fide, whether he was in fact a student and one of the student or teacher class in China, or a laborer there intending to be a laborer here.

He cites a number of cases in support of this proposition, but an examination of them will disclose that in each instance the Chinaman was found to be entitled to remain here either because he was a bona fide merchant during the period of registration, and therefore not required to obtain a laborer's certificate, or by reason of adversity after the pursuit of mercantile business for a long period of time after entering the country as a merchant, he had been compelled to do laboring work to support himself. None of these cases ruled that the certificate under which members of the exempt classes enter the country, is the sole test of the right to remain here. On the contrary, the Chinamen were required to show that they pursued in good faith the exempted avocation mentioned in their certificate, immediately following their entrance into the country, and that they continued to pursue such avocation until compelled for some reason to become laborers.

The theory of counsel, if adopted, would upset the whole purpose of the Chinese exclusion laws to prevent competition between American and Chinese labor. If a Chinaman having obtained admission to this country under a certifi-

cate alleging him to be a member of the excepted classes, is privileged, immediately following his admission, to enter upon the occupation of a laborer and no question can be raised as to his good faith in securing the certificate, then the provisions in the treaty permitting members of the excepted classes to come to and reside in the United States, and requiring them to bring certificates identifying them, are rendered nugatory and of no effect. It would require a strained construction to make these provisions operate to confer special privileges upon members of the excepted classes so far as their right to come to the United States and labor is concerned.

The extent to which Chinamen residing here may claim protection under these certificates has been the subject of judicial determination. In the case of *United States* v. *Yong Yew* (83 Fed., 832, 838) it was said:

> Now construing all the legislation on this subject in the light of our internal policy as already stated, I am disposed to hold that the law, properly and effectually construed, contemplates that a merchant of China may enter this country only for the purpose of prosecuting his business as a merchant here. "He may not under pretence of being a merchant secure entrance as such intending immediately to become and continue a laborer." * * * Conceding full faith and credit to his certificate of identity, his con-

> duct, in proceeding immediately to work as a laborer, and continuing so to do up to the time of his arrest, belies his pretensions as a merchant.

And again in the case of *United States* v. *Ng Park Tan* (86 Fed., 605):

> * * * This certificate is only prima facie evidence of the right of the defendant to remain in the United States, and its effect as such overcome by the other evidence in the case, showing that defendant immediately after landing in this country, engaged in manual labor.

To overcome the evidence of the Government showing him to have been a laborer at the time of his arrest, and for some time prior thereto, the Chinaman, in the case at bar, put in evidence his student's certificate and the testimony of his teacher covering the scope and extent of his studies. From all the evidence the Commissioner found that the Chinaman was not and had not been a student within the meaning of the treaty and Chinese exclusion laws, but was a laborer, and ordered him deported.

The treaty and the statutes manifestly contemplate the exclusion of all laborers. If persons whose occupation is that of laborers may by attending school bring themselves within the student class, Congress has enacted inconsistent legislation in excluding all laborers, on the one hand,

and allowing the admission of such laborers as may attend a school, on the other. The term "student" is to designate the status or occupation of a person, and does not relate to the mere accident of whether or not such person is incidentally taking a course of study.

The word "student" has a common meaning, and it must be presumed that the high contracting parties to the treaty had that meaning in mind when they agreed upon its use to cover a class of persons who should be permitted unrestricted entry into the United States. The word does not appear ever to have been the subject of judicial interpretation, so we must look to other sources for its definition. The following definitions taken from the Standard Dictionary, and the Century Dictionary and Encyclopædia, unquestionably represent the universally accepted meaning of the term:

The Standard Dictionary:

> 1. A person engaged in a course of study; especially one who attends and studies at a higher school, college, or seminary; an advanced scholar; as, a law or medical student.
>
> 2. One devoted to study; one who closely examines or investigates.

The Century Dictionary and Encyclopædia:

> A person who is engaged in a course of study either general or special; one who studies, especially with a view to education

> of a higher kind; an advanced scholar or pupil; as an academic or college student; student of theology, law, medicine, or art.

With these definitions in mind, it becomes a simple matter to determine whether the Chinaman in this case is a student, and upon this point we need look no further than his own claims regarding the character of the study he has pursued since his admission to the country. In his affidavit accompanying his application for a new trial it is stated (R. 21): that he came to the United States in July, 1899, and had resided therein up to the time of his arrest, which by the complaint is shown to have been made on November 23, 1904, a period of over five years, and yet that at the end of that time he was only pursuing a rudimentary course in English. It hardly seems possible that if he had in good faith been a student he would not have progressed beyond that stage in his studies. The affidavit further says:

> * * * He went to the Presbyterian Sunday School held in the Presbyterian Church, in Omaha, at the corner of Seventeenth and Dodge streets, opposite the Post-Office Building, and became a regular attendant of that Sunday School, and continued a member of that class for several years and all the while it was in existence; that he at the same time pursued his studies diligently through the week and attended the private

school, one of his sunday school teachers; Mrs. Anna M. Sykes, kindly offered to teach him the English language; and affiant states that he was in the habit of going to her home daily for his lessons, and that Mrs. Sykes would give him his lessons, etc.

An affidavit of Mrs. Sykes, his teacher, was also submitted, and her statement is as follows (R., p. 24):

* * * Affiant states that she has resided in Omaha about eleven years and has been a member of the Presbyterian Church at Seventeenth and Dodge streets in Omaha, Nebr., and has been a teacher in the Sunday school of that church during nearly all that time; that there has been in the Sunday school a class of Chinese boys composed of Chinese who have recently come here from China; the object of the Chinese class was to make them better citizens and especially to teach them the English language as well as Christian principles; that the class met on every Sunday of the year, except perhaps a few Sundays in midsummer, and was conducted as an exercise in the study of the English language, the class using a prepared book for that purpose with the English and Chinese set opposite on the same page; affiant was a teacher of said class when the defendant, Leo Hop Fong, came to Omaha, and she became acquainted with him in the class very soon after his coming, and ever after that Leo Hop Fong was a

> regular attendant; that in addition to his attending the Sunday school class he also came to her residence during the week time and would come there day after day during the year as often as it was convenient for affiant to give him a lesson * * * .

Thus it will be seen that the study pursued by the defendant since his admission to this country was of the most rudimentary character, such as every Chinese laborer coming to the United States for the first time, would naturally pursue. To uphold the contention that such study constituted the defendant a student would result in defeating the very purpose of the Chinese exclusion laws, and in making their enforcement a practical impossibility. Under such an interpretation of the word student, a Chinese laborer desiring to obtain admission to and residence in this country need only present a certificate setting forth that he is a student, *i. e.*, that he has been attending a school, and then, upon gaining admission to the country, to connect himself with some Sunday school class, as in the case at bar, or through some similar means pursue elementary study. Such a proposition is out of harmony with the commonly accepted meaning of the word student, and is opposed to the spirit and letter of the treaty and exclusion laws.

III.

Conclusion.

The remaining assignments of error either contain in different form the errors here noticed or relate to matters which, even though established, would not support a decree of reversal.

The finding in this case is supported by two judgments below, and, as previously pointed out, the testimony upon which the Commissioner and District Court grounded their decisions has not been preserved. No showing of abuse of discretion is made, and this court will not, therefore, disturb those judgments. *Chin Bak Kan* v. *United States* (186 U. S., 193, 201).

The defendant has clearly failed to sustain the burden the statute imposes upon him of establishing "by affirmative proof, to the satisfaction of such justice, judge, or Commissioner, his lawful right to remain in the United States," as a student.

The judgments below should be affirmed.

ALFORD W. COOLEY,
Assistant Attorney-General.

MARCH, 1908.

○

LIU HOP FONG *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 181. Argued March 18, 1908.—Decided April 20, 1908.

Under the provisions of § 13 of the act of September 13, 1888, c. 1015, 25 Stat. 476 and § 3 of the act of May 15, 1890, c. 60, 27 Stat. 25, the appeal given to a Chinaman from an order of deportation made by a commissioner is a trial *de novo* before the district judge to which he is entitled before he can be ordered to be deported, and the order cannot be made on a transcript of proceedings before the commissioner.

After a commissioner has made and filed a certified transcript in the case of a Chinaman ordered by him to be deported his authority over the matter ends. There is no statutory right to make up and file additional findings.

While a certificate issued as provided by § 3 of the Treaty of December, 1894 between the United States and China to entitle Chinese subjects to enter the United States may be overcome by proper evidence, and may not have the effect of a judicial determination, when a Chinaman has been admitted to the United States on a certificate made in conformity with the treaty, he cannot be deported for having fraudulently entered the United States unless there is competent evidence to overcome the legal effect of the certificate.

THE facts are stated in the opinion.

Mr. Frank L. McCoy, with whom *Mr. John L. Webster* and *Mr. Robert H. Olmsted* were on the brief, for plaintiff in error:

The complaint is insufficient in substance to sustain the conviction or order of deportation, in that it does not allege facts showing fraud in defendant's coming to the United States.

In fact the issuance to plaintiff in error of his student's certificate and his subsequent admission thereunder into this country, by the officers of the government, operated as an adjudication of the *bona fides* and lawfulness of his coming. That decision, unappealed from, is *res judicata* and entitles the defendant to remain here, at least until such determination is overcome by strong competent evidence. And his changing his occupation from student to laborer, or anything else, after coming here, would not constitute such overcoming evidence or defeat his right to remain here. His right to remain depends altogether on his "coming," whether that was lawful, whether *bona fide* or *mala fide*, whether he was in fact a student and one of the student or teacher class in China, or a laborer there intending to be a laborer here. *United States* v. *Sing Lee*, 71 Fed. Rep. 680; *Re Chin Ark Ning*, 115 Fed. Rep. 412; *Re Yew Fing Hi*, 128 Fed. Rep. 319; *Louie Gwen* v. *United States*, 128 Fed. Rep. 522; *United States* v. *Leo Won Fong*, 132 Fed. Rep. 190, 195; *United States* v. *Joe Dick*, 134 Fed. Rep. 988, 989; *United States* v. *Seid Bow*, 139 Fed. Rep. 56; *Tom Hong* v. *United States*, 193 U. S. 517.

There was not sufficient evidence before the District Court to warrant or support the finding that plaintiff in error was not one of the student or teacher class in China, or that he came into the United States *mala fide* and fraudulently, or to sustain the order of deportation.

There is no support in the evidence for the judge's findings, except perhaps in the commissioner's additional and separate findings of December 30. And such additional findings were not competent evidence, or indeed any evidence.

There was evidence before the court in plaintiff in error's favor, which created a presumption of the rightfulness of plaintiff in error's presence here at all times, which presumption was just as conclusive as an adjudication, unless it was overthrown by positive, direct and competent evidence of fraud to the contrary. And this conclusive evidence in plaintiff in error's favor was the certificate, with all its indorsements, under which he was admitted into the United States. There was no competent evidence to overthrow it or even in contradiction thereof, the findings of December 30 being merely gratuitous, without authority or sanction in law; and the rightfulness or lawfulness of plaintiff in error's coming, entry and continued residence here is therefore undisputed in the evidence. *United States* v. *Sing Tuck*, 194 U. S. 161; *United States* v. *Ju Toy*, 198 U. S. 253; *Andrews* v. *Eastern Oregon Land Co.*, 203 U. S. 127.

The burden of proof in a case of this nature is on the Government. *Moy Suey* v. *United States*, 147 Fed. Rep. 697.

This court will review the evidence and find for itself the facts, particularly in view of the fact that the district judge and commissioner misconstrued the treaty and laws and their findings of fact were made what they are only because of their misconceived idea of the true intent and meaning of said treaty and laws. *Tom Hong* v. *United States*, 193 U. S. 517; *United States* v. *Seid Bow*, 139 Fed. Rep. 56; *Moy Suey* v. *United States*, 147 Fed. Rep. 697.

Mr. Assistant Attorney General Cooley for defendant in error:

The procedure followed was regular, and satisfied the requirements of the law. The complaint should not be tested by the technical rules of pleading in criminal cases. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 728; *Chin Bak Kan* v. *United States*, 186 U. S. 193, 199; *Ah How* v. *United States*, 193 U. S. 65, 77.

The policy of the law in regard to a deportation proceeding

seems merely to require a fair, though summary hearing. *Chin Yow* v. *United States*, 208 U. S. 8. The court was justified in affirming the decision solely upon the commissioner's report of the evidence. *Ah How* v. *United States*, 193 U. S. 78.

A student's certificate is only *prima facie* evidence of the right of the Chinaman to remain in the United States, and its effect may be overcome by other evidence in the case. Such evidence was furnished by the Government officers in this case, and the order of deportation was rightfully entered. *United States* v. *Yong Yew*, 83 Fed. Rep. 832; *United States* v. *Ng Park Tan*, 86 Fed. Rep. 605.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff in error, Liu Hop Fong, on November 23, 1904, was arrested upon the sworn complaint of the United States district attorney and brought before a United States commissioner at Omaha, Nebraska, charged with being unlawfully within the United States of America, living and residing at Omaha, Nebraska, and there pursuing the occupation of a common laborer, contrary to the laws of the United States. The complaint prayed that he might be arrested and dealt with according to law. Upon a plea of not guilty, on December 29, 1904, a hearing was had before the commissioner. The bill of exceptions shows that the commissioner on December 29, 1904, made an order finding the defendant guilty, and ordered his deportation from the United States to the Empire of China; that an appeal was taken to the District Court of the United States for the District of Nebraska; that the case was heard upon the thirteenth day of April, 1905, being one of the days of the November term of the District Court; that the case was tried and submitted to the judge without any new evidence upon the complaint, upon the transcript of the proceedings made by the United States commissioner from whose order the case was appealed, and the additional sep-

arate findings made by the commissioner and the original student's certificate of the defendant and the translation thereof, with all indorsements and certificates thereon under which the defendant was admitted into and entered the United States. The commissioner's transcript shows:

On November 23, 1904, the defendant was brought before the commissioner, entered a plea of not guilty, and the hearing was continued to December 29, 1904, when witnesses were examined for the United States and for the defendant. Their names are given, but their testimony is not set out. On the same day (December 29, 1904) defendant was adjudged guilty and ordered to be deported, and on that day defendant appealed to the District Court and gave bond for his appearance in that court. This transcript was duly certified and indorsed, filed January 9, 1905, by "R. C. Hoyt, Clerk," and the commissioner filed additional and separate findings bearing date December 30, 1904, as follows:

"That the said Liu Hop is a Chinese manual laborer, and was born in and is a subject to the (Emperor) of China; that he was found within the limits of the United States, to wit, in the city of Omaha, Douglas County, State of Nebraska, in the District of Nebraska, on the 23d day of November, A. D. 1904, and that when he was so found as aforesaid, the said Liu Hop was in possession of a certain certificate, proper in form, No. 179, registered in book three, folio 164, issued by the Colonial Secretary of Macau Province, by authority of H. E. Governor of said province, and dated the 17th day of May, 1899, which said certificate, among other things, recites as follows:

"'By order of H. E. the Governor, I grant this passport to a Chinaman Liu Hop, bachelor, natural, and residing in Macua, student of Chinese literature for over 4 years, being his professor Lu-ioc-po, living in Rua dos Mercadores, No. 180, to go to the United States of America, in order to study there the English language and European sciences, and to live in the company of his brother Eiu-eng-Fun, manager of the firm

"Lun-Sing-Chong"—Rockspring, Wyo.—San Francisco, California.'

"That I find from the evidence adduced upon the hearing herein that the said Liu Hop landed in the city of San Francisco on or about July 3, 1899, and shortly thereafter and during said year of 1899 came to the city of Omaha, State and district of Nebraska, where he has ever since resided and still resides.

"I further find that during the time of his residence in said city he has at all times been a common laborer, and has at no time pursued the study of the English language beyond the merest rudiments taught by his Sunday school teacher, and has at no time pursued the study of European sciences or any other study except as to the rudiments of the English language; and that the said Liu Hop has at no time been a student within the meaning of the act of Congress approved May 5, 1892, and acts of Congress amendatory thereof, and that he is now unlawfully within the United States of America.

"To all of which foregoing order and findings of the United States commissioner, the said Liu Hop excepts and prays an appeal, and bail is fixed in the sum of $500.00; his certificate pending an appeal to remain in the custody of the said United States commissioner."

These findings are endorsed as follows: "Filed Jan. 9, 1905. R. C. Hoyt, Clerk."

The certificate upon which the plaintiff in error was admitted to this country is as follows:

"(*Endorsements—Translation.*)

"Government of Macau Province.

"Colonial Secretary of Macau Province. No. 179. Registered in Book 3, folio 164.

"Maria Pires Nonteiro Bandeira de Lima, Colonial Secretary of Macau Province, His Majesty the King, &c., &c.

"By order of H. E. the Governor, I grant this passport to a Chinaman Liu-Hop, bachelor, natural and resident in Macau, student of Chinese literature for over 4 years being his professor Liu-ioc-po, living in Rua dos Mercadores, No. 180, to go to the United States of America, in order to study there the English language and European sciences, and to live in the company of his brother Liu-eng-Fun, manager of the firm 'Lun-Sin-Chong'—

Signals:	
Age.....	20 years.
Height	1 m. 590 ms.
Face.....	Long.
Hair	Black.
Eyebrows..	do.
Eyes.....	Dark chestnut.
Nose.....	Flat.
Mouth	Big.
Color of the Asiatic Race.	
Cost of passport, $3.50.	

"Rockspring, Wyo.—San Francisco—Cal.

"Guaranteed.

"Fulfilling the obligation to have this passport viséd by the respective diplomatic or consular agent residing in this city, I beg to request the administrative authorities, and all those to whom it may concern, not to put any objection to the bearer.

"Valuable for 30 days to leave this city.

"Given at Macau on the 17th day of May 1899.

"By authority of H. E. the Governor.

"The Colonial Secretary,

"MARIO B. DE LIMA.

(Signed)

"Bearer's signature

(S'd) LIU HOP.

"Translated by A. M. Roza Peruia, Jr.

"Visé U. S. Consulate General Hongkong, May 31, 1899.

"R. WILDMAN, *Consul Gen.*"

The bill of exceptions further shows that the evidence taken before the commissioner was not reduced to writing or preserved, or in any manner taken to the District Court, and no further or other evidence was submitted by either of the parties. After argument of counsel the judge filed an opinion and

ordered the defendant to be deported, to which the defendant excepted.

The opinion of the learned District Judge, a copy of which is given in the record, shows that the order of deportation was made because in his opinion the facts as found by the commissioner indicate that Liu Hop Fong did not come to the United States to study the English language and the English sciences as a student, and that such contention was a mere device to gain entrance into this country, and not in good faith to pursue studies as a student, and his real intent was to labor only; "and I am of the opinion," says the learned judge, "that his entry under the certificate mentioned was a fraud upon the United States, and such certificate does not afford him protection." He thereupon affirmed the finding and judgment of the commissioner. Subsequently, and after the adjournment of the term at which this order was made, a petition was filed for a new trial upon the record and affidavits submitted on behalf of Liu Hop Fong, and while the judge recognized that he had no further power over the proceedings after the adjournment of the court for the term, upon investigation adhered to his former opinion as to the order of deportation.

We need not be concerned with these proceedings after the term, for clearly the judge's authority over the case had ended. The question is here upon the record made in the original proceeding before him. Was the judge warranted in making the order of deportation? By the third section of the treaty with China of December 8, 1894 (28 Stat. 1210), it is provided:

"The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they last resided, viséd by the diplomatic or consular

representative of the United States in the country or port whence they depart."

By § 13 of the act of 1888 (25 Stat. 476), it is provided:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge or commissioner of any United States court, returnable before any justice, judge or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came."

By § 3 of the act of May 5, 1892 (27 Stat. 25), it is provided:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States."

Section 13 of the act of 1888 (25 Stat. 476) also provides that any Chinese person convicted before the commissioner of the United States court may within ten days of such conviction appeal to the judge of the District Court for the district.

In this case the Chinaman did prosecute his appeal from the commissioner to the District Judge. The statute is curiously silent as to how the appeal is to be heard; it says nothing as to what papers are to be filed or as to what testimony shall be given. In our view, in giving the Chinaman an appeal, the law contemplates that he shall be given the right of a hearing *de novo* before the district judge before he is ordered to be deported. It is a serious thing to arrest a Chinaman, who, as in this case, has been in this country a number of years, lawfully admitted upon a certificate complying with the treaty, and order his deportation without giving him a full oppor-

tunity to assert his rights before a competent court. There being no provision of the statute that the hearing shall be upon a transcript of the proceedings before the commissioner, we think when a party demands it Congress intends he shall have the right to a hearing and judicial determination before the District Judge.

In the case of *Ah How* v. *United States*, 193 U. S. 65, it was assumed that the judge who tried the case upon appeal did so solely upon the commissioner's report, and heard no witnesses. In *Tom Hong* v. *United States*, 193 U. S. 517, the commissioner made a finding, which was made part of the record by order of the District Court. In the present case the record shows that there was before the District Court the transcript of the proceedings hereinbefore set out as having taken place before the commissioner on December 29, 1904; and then, without the order of the court, an additional and separate finding of the commissioner appears to have been filed. We are not aware of any statute that gives the commissioner a right to make up and file such additional finding; he had made and filed a certified transcript in the case, and there ended his authority in the matter. There was no order, as in the *Tom Hong case*, making the commissioner's findings part of the record. There was no consent to a hearing of the case upon such additional findings, and the case presented to the District Judge embraced the student's certificate hereinbefore referred to, and a statement that witnesses were examined without any findings of facts or the giving of any testimony. On this state of the record we are of the opinion that the court had no authority to order the deportation of the Chinaman.

The treaty with China provides that officials, teachers, students, etc., shall have the privilege of coming to and residing in the United States (Article 3, Treaty of December, 1894, above referred to), and further provides:

"To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they

last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart."

When this young man entered a port of the United States in July, 1899, he presented such a certificate, duly issued and viséd by the consular representative of the United States. Upon application for admission this certificate is *prima facie* evidence of the facts set forth therein. 22 Stat. 58, § 6; 33 Stat. 428. This certificate is the method which the two countries contracted in the treaty should establish a right of admission of students and others of the excepted class into the United States, and certainly it ought to be entitled to some weight in determining the rights of the one thus admitted. While this certificate may be overcome by proper evidence and may not have the effect of a judicial determination, yet being made in conformity to the treaty, and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported, as in this case, because of wrongfully entering the United States upon a fraudulent certificate, unless there is some competent evidence to overcome the legal effect of the certificate. In this record we can find no competent testimony which would overcome such legal effect of the certificate, and the plaintiff in error was therefore wrongfully ordered to be deported.

The judgment of the District Court is reversed, and the cause remanded to that court with directions to discharge the plaintiff in error from custody without prejudice to further proceedings.